

# EXHIBIT 1

1  
2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
4 Civil Case No. 1:16-CV-08364

5 - - - - -x

6 ANNE DE LACOUR, ANDREA WRIGHT, AND LOREE  
7 MORAN individually and on behalf of all  
8 others similarly situated,

9 Plaintiffs,

10 -against-

11 COLGATE-PALMOLIVE CO. and TOM'S OF MAINE,  
12 INC.,

13 Defendants.

14 - - - - -x

15 VIDEOTAPED REMOTE DEPOSITION of  
16 BRIAN SOWERS, an Expert Witness, located  
17 in Acton, Massachusetts, commencing at  
18 9:56 a.m., on Tuesday, September 13,  
19 2022, taken before Dawn Matera, a  
20 Shorthand Reporter and Notary Public of  
21 the State of New York.  
22  
23  
24  
25

1 BRIAN SOWERS

2 take in marketing? 10:27:11

3 A. There was a marketing 10:27:11

4 communication class. I think the market 10:27:15

5 research course may have been part of my 10:27:22

6 marketing concentration. I don't 10:27:23

7 remember. It's been a while. Those two 10:27:30

8 for sure I remember. But there were a 10:27:32

9 number of others I had to complete for 10:27:34

10 the concentration. 10:27:35

11 Q. And why did you decide to get 10:27:40

12 an MBA? 10:27:41

13 A. I wanted to go back to school. 10:27:43

14 I wasn't quite sure what I wanted to do 10:27:46

15 at the time, but I knew that an MBA would 10:27:51

16 open more doors than simply having a 10:27:55

17 bachelor's degree. 10:27:58

18 Q. And then how did you get into 10:27:58

19 the world of litigation consulting? 10:27:59

20 A. When I started at Applied 10:28:02

21 Marketing Science. 10:28:06

22 So AMS is a full service market 10:28:06

23 research firm and they have two lines of 10:28:10

24 business. One is the more traditional 10:28:14

25 market research, which is the experience 10:28:16

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2 I had previously, and they also have a 10:28:18  
3 practice in litigation support which I 10:28:20  
4 was not familiar with until I started at 10:28:23  
5 AMS. And I started doing that and found 10:28:27  
6 that I really enjoyed that more than 10:28:28  
7 traditional market research and focused 10:28:30  
8 on that side of the business and have 10:28:32  
9 since then. 10:28:34

10 Q. Understood. So when you 10:28:35  
11 started at AMS was the plan to work on 10:28:36  
12 the marketing research side of business 10:28:42  
13 and then you kind of segued into 10:28:46  
14 litigation consulting or do I have that 10:28:49  
15 wrong? 10:28:52

16 A. I should clarify, they are both 10:28:52  
17 market research. Just what we call the 10:28:53  
18 innovation does more traditional market 10:28:57  
19 research. The litigation side does 10:29:00  
20 market research for litigation. At the 10:29:01  
21 time I started, people would work on both 10:29:03  
22 sides of the business. Since then it 10:29:06  
23 shifted to where people work exclusively 10:29:09  
24 on one side or the other. And I think I 10:29:11  
25 was part of that trend. 10:29:16

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2 When I came over, I said I 10:29:17  
3 really want to focus on litigation. So I 10:29:18  
4 think maybe, maybe for the first six 10:29:22  
5 months I was at AMS I kind of did both, 10:29:23  
6 but since then I have been working 10:29:25  
7 exclusively on the litigation side. 10:29:27

8 Q. You may have said this before, 10:29:34  
9 is there a reason why you wanted to focus 10:29:36  
10 on the litigation side? 10:29:37

11 A. I think in a lot of traditional 10:29:43  
12 market research you conduct research and 10:29:45  
13 nothing really happens with it. It just 10:29:47  
14 sits on someone's shelf. So I was drawn 10:29:49  
15 to the litigation side because it's more, 10:29:53  
16 I don't know, actionable, I guess. The 10:29:58  
17 results are being used for something. 10:29:59

18 And I also, really, kind of the 10:30:01  
19 level of exactitude that the Courts 10:30:03  
20 require for surveys for litigation just 10:30:07  
21 suited my working style and my 10:30:10  
22 preferences more. 10:30:11

23 Q. So at what point or in what 10:30:22  
24 year did you start working exclusively on 10:30:24  
25 litigation matters? 10:30:28

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2 A. I started in November of 2011, 10:30:28  
3 so it would have been early 2012 where I 10:30:36  
4 started working exclusively for 10:30:38  
5 litigation. 10:30:40

6 Q. Okay. So would it be fair to 10:30:42  
7 say, sir, that since 2012, litigation 10:30:43  
8 consulting has been your primary source 10:30:49  
9 of income? 10:30:54

10 A. Yes. I mean, working on that 10:30:55  
11 side of the business, yes. 10:30:58

12 Q. Okay. Do you have an estimate 10:30:58  
13 of what percentage of your income is 10:31:00  
14 derived from litigation consulting? 10:31:03

15 A. Well, I mean, you know, I work 10:31:05  
16 for AMS. AMS pays me, not the litigation 10:31:08  
17 practice. But I am also a member of the 10:31:12  
18 executive team at AMS. 10:31:15

19 So I would say probably 80 to 10:31:17  
20 85 percent of my time is spent on expert 10:31:20  
21 work and 15 or 20 percent is spent on 10:31:22  
22 kind of general firm management issues. 10:31:27  
23 So I am also paid for that work as part 10:31:29  
24 of my role. 10:31:34

25 Q. Okay. Is it two different 10:31:34

1	BRIAN SOWERS	
2	paychecks?	10:31:38
3	A. No, no.	10:31:38
4	Q. Do you have any other source of	10:31:42
5	income, other than your work at AMS?	10:31:44
6	A. No, I don't.	10:31:46
7	Q. Okay. Do you have any other	10:31:46
8	postgraduate degrees, sir?	10:31:52
9	A. No, I don't.	10:31:54
10	Q. Have you considered going back	10:31:55
11	to school to obtain another degree?	10:31:59
12	A. I don't think at this point in	10:32:02
13	my career it's necessary. I have a	10:32:06
14	daughter about to go into college. So	10:32:08
15	that expense consideration has shifted.	10:32:10
16	Q. Okay. Well, I guess do you	10:32:12
17	have any interest in it, sort of	10:32:16
18	academically?	10:32:18
19	A. I don't think so. I think I	10:32:18
20	keep busy enough with my work and I enjoy	10:32:20
21	it, there is no need for me	10:32:24
22	professionally or I don't think I would	10:32:26
23	have the time to take on another degree,	10:32:27
24	either.	10:32:30
25	Q. Have you published -- have you	10:32:30

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2 published any work, sir? 10:32:37

3 A. Just one. I think on my CV 10:32:39  
4 page A9, it's an article called "Surveys 10:32:51  
5 in Lanham Act Matters." 10:32:54

6 Q. And that was in the IP 10:33:01  
7 Litigator? 10:33:03

8 A. That's correct. 10:33:03

9 Q. How did that article sort of 10:33:08  
10 come about? 10:33:10

11 A. I think I have taught a CLE 10:33:12  
12 accredited course for many years on 10:33:15  
13 surveys and litigation. And somehow 10:33:18  
14 someone from IP Litigator had heard about 10:33:20  
15 it and reached out to me and some of my 10:33:23  
16 colleagues to see if we would be 10:33:25  
17 interested writing an article kind of 10:33:28  
18 around similar topics we discussed in the 10:33:30  
19 CLE course. 10:33:34

20 Q. Have you published or 10:33:40  
21 considered publishing in any academic 10:33:41  
22 publications? 10:33:43

23 A. No. I am a practitioner, not 10:33:44  
24 an academic. So my focus is more on 10:33:48  
25 performing the research rather than 10:33:51



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2 writing about it. 10:33:53

3 Q. Do you keep abreast of academic 10:33:55  
4 literature on marketing research? 10:33:58

5 A. Yes, I do. 10:34:02

6 Q. I guess which journals do you 10:34:03  
7 follow? 10:34:05

8 A. I think it's more, if you look 10:34:05  
9 at my affiliations, a lot of the best 10:34:11  
10 practices from market research come 10:34:13  
11 through them. 10:34:15

12 So, for example, the American 10:34:17  
13 Association for Public Opinion Research, 10:34:18  
14 they publish a monthly journal with 10:34:22  
15 articles and best practices for research. 10:34:23  
16 And those tend to be academic articles. 10:34:26

17 The Insights Association also 10:34:31  
18 publishes often on best practices for 10:34:34  
19 research. 10:34:37

20 And then again my involvement 10:34:37  
21 with the International Trademark 10:34:38  
22 Association, there are lots of -- they 10:34:40  
23 publish a journal called the Trademark 10:34:46  
24 Reporter which provides a lot of academic 10:34:48  
25 research related to surveys for 10:34:50

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2 litigation. Those are my primary 10:34:53

3 sources. 10:34:55

4 There are others that I see in 10:34:55

5 courts, that sort of thing. They will 10:34:58

6 have the American Marketing Association 10:35:00

7 will often publish papers. It's a 10:35:03

8 variety of sources. 10:35:05

9 Q. And these professional 10:35:10

10 affiliations, I see you're a member of 10:35:11

11 two committees at INTA? 10:35:17

12 A. That's correct. 10:35:21

13 Q. And then you're also a chair of 10:35:22

14 one of those two committees or that's a 10:35:25

15 separate -- 10:35:28

16 A. I'm sorry, I should clarify. I 10:35:28

17 was a former member of the impact studies 10:35:30

18 committee. I am currently a member of 10:35:34

19 the famous and well-known marks committee 10:35:36

20 and as part of that committee I chair the 10:35:39

21 dilution subcommittee. 10:35:41

22 Q. Got it. And then what sort of 10:35:42

23 work do you do as chair of the dilution 10:35:44

24 subcommittee? 10:35:48

25 A. INTA is a global organization. 10:35:49

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2 So within of the things that they try to 10:35:54  
3 do is provide guidance to brand owners 10:35:56  
4 globally. And as part of the dilution 10:35:59  
5 subcommittee, there is a lot of, I would 10:36:04  
6 say maybe misunderstanding globally about 10:36:08  
7 what dilution is and how it can be 10:36:11  
8 applied. The laws are different from 10:36:13  
9 region to region and country to country. 10:36:14

10 So in this current term what we 10:36:17  
11 are trying to do is come up with some 10:36:19  
12 general recommendations where INTA 10:36:22  
13 advocate for brand owners in certain 10:36:27  
14 countries to clarify laws around dilution 10:36:30  
15 or in some countries advocate for 10:36:32  
16 establishing dilution as a legal 10:36:37  
17 strategy. So it's a lot of kind of 10:36:39  
18 coordinating globally in trying to get a 10:36:41  
19 consensus on what the law should be. 10:36:46

20 Q. Okay. And then do you issue 10:36:48  
21 any papers or recommendations as part of 10:36:52  
22 your work on the dilution subcommittee? 10:36:56

23 A. Yes. Right now there are five 10:36:59  
24 working groups that I manage in the 10:37:05  
25 subcommittee. The output from each of 10:37:07

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2 those committees, some will be a paper. 10:37:08

3 Some will be an article. Some will 10:37:11

4 simply be recommendations into leadership 10:37:13

5 about strategies they might do. But I 10:37:15

6 think for at least one of the working 10:37:19

7 groups, the output is expected to be an 10:37:21

8 article in the Trademark Reporter 10:37:23

9 magazine. 10:37:25

10 Q. And what's the Insights 10:37:32

11 Association? 10:37:34

12 A. It's a group of market research 10:37:34

13 professionals and across the spectrum of 10:37:41

14 market research professionals. So it 10:37:42

15 could be people doing research for 10:37:46

16 litigation. People doing general market 10:37:47

17 research. Political polling, that sort 10:37:49

18 of thing. They establish kinds of best 10:37:52

19 practices for the way research is 10:37:54

20 conducted. 10:37:57

21 They establish, for example, 10:37:58

22 the protocol for maintaining respondent 10:37:59

23 confidentiality, that sort of thing. 10:38:03

24 It's kind of a self-regulating industry, 10:38:06

25 so that everyone knows the rules and they 10:38:10

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2 update them constantly, so that everyone 10:38:11  
3 is really following best practices when 10:38:13  
4 conducting research regardless of the, 10:38:17  
5 you know, of the venue. 10:38:20

6 Q. Okay. And I guess what is your 10:38:22  
7 affiliation with the Insights 10:38:25  
8 Association? 10:38:27

9 A. The Insights, I am a member. I 10:38:27  
10 simply read the materials they put out. 10:38:32  
11 Occasionally I will go to some of their 10:38:35  
12 conferences. That sort of thing. 10:38:37

13 Q. Okay. And as a member you pay 10:38:39  
14 dues? 10:38:41

15 A. Yes, that's correct. 10:38:41

16 Q. Then what about the AAPOR, what 10:38:46  
17 is your affiliation with that 10:38:49  
18 organization? 10:38:51

19 A. Similar to the Insights 10:38:51  
20 Association. I think unlike the Insights 10:38:54  
21 Association, the AAPOR is more academic. 10:38:57

22 Like I said, they publish a 10:39:04  
23 monthly journal where they will, mostly 10:39:05  
24 peer-reviewed articles related to new 10:39:09  
25 developments in market research. So it's 10:39:11

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2 a way to keep on top of kind of what's 10:39:13  
3 happening in the academic world, I would 10:39:19  
4 say. 10:39:21

5 Q. Okay. And other than these 10:39:21  
6 professional affiliations, do you keep 10:39:22  
7 abreast of other academic journals or 10:39:25  
8 peer-reviewed publications on marketing 10:39:30  
9 research or consumer psychology? 10:39:32

10 A. Again, you know, the American 10:39:34  
11 Marketing Association will often publish 10:39:39  
12 articles or journals and I often see 10:39:46  
13 those. 10:39:47

14 For purposes of what I do, 10:39:48  
15 there are a series of treatises and books 10:39:50  
16 and articles specifically about survey 10:39:52  
17 for litigation. I tend to keep more up 10:39:55  
18 to date with that because it's more 10:40:03  
19 relevant for the type of work I am doing. 10:40:05

20 Q. Okay. And some of those you 10:40:07  
21 cited in your report in this case; is 10:40:09  
22 that right? 10:40:11

23 A. That's correct. 10:40:11

24 Q. Are you familiar with the 10:40:11  
25 Journal of Marketing Research? 10:40:22

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2 A. I am, yes. 10:40:22

3 Q. What do you understand that 10:40:23  
4 publication to be? 10:40:25

5 A. It's a journal of peer-reviewed 10:40:25  
6 research that's published. I read 10:40:30  
7 articles from that before. 10:40:32

8 Q. And do you have a view on the 10:40:34  
9 articles in the Journal of Marketing 10:40:37  
10 Research? 10:40:39

11 A. I think they are peer-reviewed 10:40:39  
12 so that lends to it certain credibility. 10:40:45  
13 They are not always relevant for surveys 10:40:48  
14 for litigation. 10:40:50

15 So, you know, I read the ones 10:40:50  
16 that are most relevant to litigation. 10:40:52  
17 Others are more kind of hypothetical and 10:40:55  
18 don't really apply to what I do. So I 10:41:01  
19 only read really the articles that apply 10:41:03  
20 to what I do. 10:41:05

21 Q. And can you think of an article 10:41:06  
22 that you read from the Journal of 10:41:09  
23 Marketing Research that was relevant to 10:41:11  
24 what you do? 10:41:12

25 A. Not recently. Again, most of 10:41:13

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2 the literature I rely on is literature 10:41:19  
3 specifically used for surveys in 10:41:22  
4 litigation. It's been a while. 10:41:24

5 Q. Okay. And are you familiar 10:41:25  
6 with the Journal of Consumer Psychology? 10:41:26

7 A. I may have heard of it. Not 10:41:30  
8 something that I read. 10:41:33

9 Q. Okay. What about the Journal 10:41:34  
10 of Consumer Research? 10:41:37

11 A. Again, I heard of it. But it's 10:41:37  
12 less relevant to surveys used for 10:41:42  
13 litigations and not something I pay a lot 10:41:44  
14 of attention to unless something pops up. 10:41:48

15 Q. And when you say it's not 10:41:50  
16 relevant to surveys used for litigations, 10:41:52  
17 what do you mean by that? 10:42:01

18 A. I mean sometimes these articles 10:42:03  
19 can be about research that just doesn't 10:42:05  
20 apply to litigation research. It might 10:42:08  
21 be about best practices for concept 10:42:10  
22 testing, or what purchase intents scale 10:42:13  
23 to use when you're doing a multicountry 10:42:19  
24 survey. None of that is really 10:42:22  
25 applicable to a deceptive advertising 10:42:24



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2 survey, for example. 10:42:28

3 Q. And I guess, how do you know 10:42:42  
4 whether an article is relevant for 10:42:43  
5 litigation surveys? 10:42:48

6 A. Typically, if I see something I 10:42:49  
7 will look at that and it will, you 10:42:54  
8 know -- again, for litigation surveys, I 10:42:56  
9 don't conduct litigation surveys in Asia, 10:43:01  
10 for example, I just don't. So if it's an 10:43:04  
11 article about emerging research issues in 10:43:06  
12 Asia, that is not something that I am 10:43:08  
13 going to pay attention to. 10:43:10

14 It's really if an article comes 10:43:11  
15 about that could potentially apply to 10:43:13  
16 what I do for litigation surveys. Then I 10:43:15  
17 would probably read it. 10:43:18

18 Q. What about the Journal of the 10:43:24  
19 Association For Consumer Research, are 10:43:30  
20 you familiar with that publication? 10:43:31

21 A. I am not sure I heard of that 10:43:34  
22 one before, no. 10:43:35

23 Q. Have you, I guess, on your -- 10:43:36  
24 let me start the question over, sorry 10:43:41  
25 about that. 10:43:42

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2 A. Sure. 10:43:43

3 Q. On your CV, you have listed a 10:43:44  
4 presentation here "Emerging issues 10:43:46  
5 related to the use of surveys in IP 10:43:49  
6 matters"? 10:43:53

7 A. Yes. 10:43:53

8 Q. Other than that presentation, 10:43:53  
9 have you conducted any other 10:43:56  
10 presentations on survey issues? 10:43:58

11 A. Yeah. As I mentioned before -- 10:44:02  
12 we didn't do it this year but typically 10:44:10  
13 AMS puts on a yearly webinar that is a 10:44:13  
14 CLE-accredited webinar on the topic of 10:44:16  
15 surveys for IP matters. 10:44:20

16 So in the past maybe, five or 10:44:22  
17 six years we've typically put that on 10:44:23  
18 annually. 10:44:26

19 Q. And the CLE is for lawyers? 10:44:29

20 A. Yes. 10:44:30

21 Q. So you've listed sort of, you 10:44:39  
22 know, a significant number of matters 10:44:41  
23 here for which you either provided an 10:44:51  
24 expert report or testimony in the last 10:44:53  
25 five years. And then, you know, the 10:44:54

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2 eight that we discussed, sort of at the 10:44:58  
3 beginning of your deposition. Are there 10:45:00  
4 any other expert opinions or testimony 10:45:02  
5 that you provided in the last five years 10:45:07  
6 that aren't listed in this appendix to 10:45:09  
7 your report in this case? 10:45:13

8 A. No. Other than those eight 10:45:15  
9 that we discussed already, everything 10:45:20  
10 else is accurate. 10:45:22

11 Q. And then you provided sort of 10:45:26  
12 descriptors here for each of these cases; 10:45:30  
13 false advertising, secondary meaning, 10:45:33  
14 trademark confusion. Is there a reason 10:45:37  
15 that you provided that? 10:45:41

16 A. Some of that is for my own 10:45:45  
17 reference when I am asked about it. Some 10:45:46  
18 is, you know, is the trier of fact or 10:45:50  
19 whoever may want to see my experience may 10:45:56  
20 see the types of cases that I worked on 10:45:58  
21 in the past. 10:46:01

22 Q. Are there differences in the 10:46:07  
23 kind of surveys or opinions or testimony 10:46:10  
24 that you would provide in a trademark 10:46:11  
25 confusion case than you would in a false 10:46:13

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2 advertising case? 10:46:15

3 A. The surveys themselves follow 10:46:16

4 generally best practices of survey 10:46:23

5 research. The setup of the surveys, the 10:46:25

6 way that the survey is constructed 10:46:27

7 between a confusion survey, for example, 10:46:31

8 and a false advertising are different. 10:46:34

9 Q. And what sort of case or how 10:46:36

10 would you characterize this case, the de 10:46:40

11 Lacour case? 10:46:43

12 A. False advertising case. 10:46:43

13 Q. In the last five years, how 10:46:50

14 many false advertising cases did you 10:46:52

15 provide expert opinion or testimony in? 10:46:56

16 A. On my CV 15 and then obviously 10:47:49

17 this case and the two additional cases, 10:47:52

18 so 18 in the last five years. 10:47:54

19 Q. And in those 18 cases, has a 10:47:56

20 Court ever excluded or declined to 10:48:00

21 consider one of your opinions? 10:48:02

22 A. No, they have not. 10:48:04

23 Q. And has that ever happened to 10:48:12

24 you historically? 10:48:14

25 A. There was one case where I had 10:48:14

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2 a portion of my testimony excluded but 10:48:17

3 not the full opinion. 10:48:19

4 Q. What case was that? 10:48:20

5 A. It's Hilsinger versus Kleen 10:48:22

6 Concepts. 10:48:25

7 Q. And what sort of case was that? 10:48:25

8 A. It was a trademark confusion, 10:48:27

9 likelihood of confusion survey. And in 10:48:31

10 this particular case I had added a 10:48:33

11 question at the end of the confusion 10:48:35

12 survey that really wasn't relevant to the 10:48:37

13 issue of likelihood of confusion. And I 10:48:40

14 testified truthfully in deposition that I 10:48:42

15 had not used that type of test to test 10:48:47

16 for confusion and it was irrelevant for 10:48:50

17 purposes of my opinion. 10:48:52

18 So the Court said I could not 10:48:54

19 testify on that one question but allowed 10:48:55

20 my likelihood of confusion report in. 10:48:58

21 Q. Are there any other cases where 10:49:02

22 a Court has excluded or declined to 10:49:04

23 consider one of your opinions? 10:49:06

24 A. Not that I am aware of, no. 10:49:06

25 Q. Does the Lodestar Anstalt case 10:49:09

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2 ring a bell with you? 10:49:18

3 A. It does, yes. 10:49:19

4 Q. So did the Court in that case 10:49:21

5 decline to consider your opinion? 10:49:26

6 A. I have always been unclear on 10:49:28

7 this one. It's my understanding that 10:49:32

8 they didn't. 10:49:33

9 There was a procedural issue on 10:49:34

10 what the discovery period was and they 10:49:36

11 were -- the other side was saying that my 10:49:42

12 report was submitted, I think after 10:49:44

13 discovery closed. Lodestar was saying 10:49:46

14 that it wasn't because of some 10:49:49

15 stipulation that I am not sure of. 10:49:51

16 I think they settled before 10:49:52

17 that was ever resolved. But to the 10:49:53

18 extent it was, it was more of a 10:49:57

19 procedural issue and nothing to do with 10:49:59

20 my survey itself. 10:50:02

21 Q. Got it. So wasn't sort of the 10:50:04

22 merit or methodology that was challenged 10:50:05

23 there. It was just a procedural issue 10:50:08

24 that the lawyers sorted out? 10:50:11

25 A. That's correct. And my 10:50:14

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2 understanding is that the case settled 10:50:17

3 before it ever got resolved. 10:50:19

4 Q. Okay. And sir, I guess, how 10:50:21

5 would you describe your field of 10:50:24

6 expertise? What are you an expert in? 10:50:28

7 A. I am a survey expert, and 10:50:29

8 particularly when it comes to consumer 10:50:33

9 perceptions, behaviors and opinions. 10:50:35

10 Q. And how did you develop that 10:50:38

11 expertise? 10:50:44

12 A. Through the almost 30 years of 10:50:45

13 market research experience that I have. 10:50:48

14 The last 10 working on surveys 10:50:52

15 exclusively for litigation and some of my 10:50:53

16 graduate level course work. 10:50:59

17 Q. As part of your graduate level 10:51:03

18 course work, did you -- did you design or 10:51:08

19 execute any consumer research surveys? 10:51:14

20 A. I did. There was one course, a 10:51:17

21 market research methods course, and we 10:51:21

22 developed a survey as part of the course 10:51:23

23 itself. 10:51:29

24 Q. So just the one survey? 10:51:29

25 A. Yes. It was like a semester- 10:51:31

1 BRIAN SOWERS

2 long project to develop a survey; execute 10:51:36  
3 it, analyze it and provide the reporting 10:51:40  
4 to the professor. 10:51:41

5 Q. Are you a marketing expert, 10:51:44  
6 sir? 10:51:52

7 A. I am a survey expert, not a 10:51:52  
8 marketing expert. 10:51:55

9 Q. Okay. 10:51:55

10 MR. SAVARESSE: So we have been 10:52:15  
11 going about an hour here, maybe a 10:52:16  
12 little bit less. You know, we'll try 10:52:19  
13 to take breaks every hour or so if 10:52:20  
14 that works for you. Now is a good 10:52:23  
15 time for me to break. I am about to 10:52:27  
16 start a new topic. But if you would 10:52:29  
17 like to keep going, I am happy to stay 10:52:31  
18 on. 10:52:33

19 THE WITNESS: No, that's fine. 10:52:33  
20 If we can do a five or 10-minute 10:52:35  
21 break, that's great. 10:52:37

22 MR. SAVARESSE: Let's go off the 10:52:38  
23 record. 10:52:39

24 THE VIDEOGRAPHER: Now going off 10:52:39  
25 the record at approximately 10:52 a.m. 10:52:40



1	BRIAN SOWERS	
2	(Off the record.)	11:00:44
3	THE VIDEOGRAPHER: This is the	11:00:44
4	beginning of media two, we are going	11:00:46
5	back on the record at approximately 11	11:00:47
6	a.m. Go ahead, Counsel.	11:00:49
7	MR. SAVARESSE: All right.	11:00:52
8	Thank you, Kevin. And welcome back	11:00:52
9	everyone. Welcome back, Mr. Sowers.	11:00:55
10	BY MR. SAVARESSE:	
11	Q. I know I mentioned that we were	11:00:57
12	going to be moving on to a new topic.	11:00:59
13	But just a quick follow-up question.	11:01:01
14	I think you mentioned you had	11:01:04
15	testified about or offered opinions in 15	11:01:07
16	false advertising cases in the last five	11:01:12
17	years?	11:01:16
18	A. Yes, that was my count.	11:01:16
19	Q. Do you know how many of those	11:01:20
20	cases involved consumer packaged goods?	11:01:22
21	A. Hang on one second.	11:01:26
22	Two of those.	11:02:26
23	Q. And does that include this	11:02:27
24	case?	11:02:31
25	A. No, not including this case,	11:02:31

1 BRIAN SOWERS

2 too. Two others. 11:02:34

3 Q. So three total in the last five 11:02:35  
4 years. Are there any others that you can 11:02:37  
5 think of that aren't on your CV here? 11:02:43

6 A. Not as I sit here. I think 11:02:45  
7 those are the only two others that I am 11:02:54  
8 aware of. 11:02:56

9 Q. All right. So I marked the 11:02:57  
10 next exhibit to your deposition, sir. 11:03:02  
11 It's Sowers Exhibit 3. It should look 11:03:05  
12 familiar to you, but I will give you a 11:03:10  
13 second to pull it up. It's a big 11:03:11  
14 document. 11:03:13

15 (Sowers Exhibit 3, Expert  
16 report, was so marked for  
17 identification, as of this date.) 11:03:14

18 A. Yes, I have now. 11:03:22

19 Q. Do you recognize Exhibit 3 to 11:03:24  
20 your deposition, sir? 11:03:26

21 A. It appears to be my expert 11:03:27  
22 report. 11:03:28

23 Q. Just for the record, do you 11:03:33  
24 want to take a quick spin through it and 11:03:34  
25 make sure your initial impression is 11:03:39

1	BRIAN SOWERS	
2	correct?	11:03:42
3	A. Sure.	11:03:43
4	(Witness reviews document.)	11:03:43
5	A. Yes, it appears to be.	11:04:13
6	Q. So I understand you have a	11:04:15
7	printed copy of this report in front of	11:04:16
8	you as well. You're welcome to refer to	11:04:18
9	that. It's not a memory test today.	11:04:21
10	I'll just ask you before we get	11:04:28
11	into it, when were you retained in this	11:04:29
12	matter?	11:04:32
13	A. May of 2022.	11:04:33
14	Q. And what was the scope of your	11:04:37
15	assignment?	11:04:39
16	A. I was asked to conduct two	11:04:40
17	surveys.	11:04:42
18	Q. And what specifically were you	11:04:47
19	asked to survey?	11:04:49
20	A. Let me just go to the report.	11:04:50
21	As I state in paragraph 7, to design and	11:05:03
22	conduct two consumer surveys. The first	11:05:05
23	to test whether the "natural"	11:05:09
24	representation on the Tom's toothpaste	11:05:10
25	packaging communicates to relevant	11:05:16

1 BRIAN SOWERS

2 purchase any toothpaste or any deodorant, 11:12:08  
3 I would asking people's perceptions about 11:12:10  
4 products that they may never consider 11:12:12  
5 purchasing, which would be inappropriate 11:12:14  
6 from the survey perspective. 11:12:16

7 Q. So you excluded from your 11:12:18  
8 toothpaste survey individuals who would 11:12:24  
9 not consider purchasing natural 11:12:31  
10 toothpaste within the next six months? 11:12:34

11 A. An individual who did not 11:12:36  
12 indicate that they would be willing to 11:12:39  
13 purchase natural toothpaste or deodorant 11:12:40  
14 in the past six months would not qualify, 11:12:42  
15 that's correct. 11:12:45

16 Q. Okay. Is it possible that your 11:12:46  
17 survey excluded consumers of Tom's 11:12:51  
18 toothpaste or deodorants? 11:12:57

19 A. Again, as I said before, had I 11:12:58  
20 screened broadly like that, the bigger 11:13:04  
21 issue would have been that I would have 11:13:06  
22 likely included people in the survey who 11:13:07  
23 would never purchase Tom's products and 11:13:10  
24 then I am asking questions and asked them 11:13:13  
25 their perceptions on a product they might 11:13:14

1 BRIAN SOWERS

2 never purchase. 11:13:17

3 So I don't know if "excluded" 11:13:18

4 is the right word. I think I accurately 11:13:22

5 defined the universe to get those most 11:13:23

6 likely to purchase the products at issue. 11:13:26

7 Q. Okay. Let me try to ask the 11:13:30

8 question again because I am not sure 11:13:32

9 you've answered it. 11:13:35

10 A. Sure. 11:13:36

11 Q. I am asking is it possible that 11:13:36

12 your survey excluded consumers of Tom's 11:13:39

13 toothpastes or deodorants? 11:13:44

14 A. I think there is a slight 11:13:46

15 chance that there may be people who would 11:13:52

16 purchase. But -- and the important part 11:13:54

17 here is that the bigger issue is had I 11:13:59

18 done that, I would have gone overbroad in 11:14:02

19 my definition and I would have included 11:14:04

20 people who wouldn't have qualified. 11:14:06

21 Based on the way that I screen 11:14:08

22 for my survey, which is appropriate, I 11:14:10

23 can be confident that the people I am 11:14:11

24 interviewing are the types of consumers 11:14:13

25 who would be likely to consider 11:14:15

1 BRIAN SOWERS

2 purchasing Tom's, whereas what you were 11:14:17  
3 suggesting would not, which would have 11:14:20  
4 been a significant flaw. 11:14:22

5 Q. So I think you started 11:14:23  
6 answering the question and then it sort 11:14:31  
7 of broke off. So I will try one more 11:14:34  
8 time. 11:14:37

9 Sir, is it possible that your 11:14:38  
10 survey screening questions excluded 11:14:46  
11 consumers who were likely to purchase 11:14:48  
12 Tom's toothpaste or deodorant in the next 11:14:53  
13 six months? 11:14:56

14 MS. WESTCOT: Objection. Asked 11:14:57  
15 and answered. 11:14:58

16 A. I think maybe -- I will try to 11:14:59  
17 rephrase it a different way. 11:15:01

18 If I had excluded anyone it was 11:15:05  
19 only in an effort to avoid having an 11:15:08  
20 overbroad survey universe which would 11:15:10  
21 have certainly included people who were 11:15:12  
22 not relevant consumers. So what I have 11:15:14  
23 is a very targeted and appropriate survey 11:15:17  
24 universe. 11:15:19

25 Q. Okay. So that's the third time 11:15:20

1 BRIAN SOWERS

2 I asked the question and I don't believe 11:15:22  
3 you answered it, sir. So I am just going 11:15:24  
4 to move on. And I'll assume that you 11:15:26  
5 don't know whether your survey excluded 11:15:29  
6 purchasers of Tom's toothpaste or 11:15:33  
7 deodorant. 11:15:38

8 A. Well -- 11:15:39

9 MS. WESTCOT: Objection. This 11:15:39  
10 is a little argumentative, 11:15:40  
11 Mr. Savaresse. Is there a pending 11:15:46  
12 question? 11:15:46

13 MR. SAVARESSE: No, there is no 11:15:48  
14 question, Sarah. 11:15:49

15 A. And I thought I answered your 11:15:50  
16 question. I am trying to answer it. I 11:15:51  
17 apologize if it's not coming across 11:15:53  
18 clearly. 11:15:55

19 But as I said, my survey 11:15:56  
20 universe is appropriately defined for the 11:15:59  
21 research question I'm asking. 11:16:03

22 Q. Okay. So just turning back to 11:16:04  
23 your paragraph 7, you say that you 11:16:10  
24 "tested whether the toothpaste or 11:16:22  
25 deodorant packaging communicates to 11:16:24

1 BRIAN SOWERS

2 relevant consumers that the product 11:16:26

3 contains only natural ingredients (i.e., 11:16:29

4 no artificial ingredients)." 11:16:32

5 Is that right? 11:16:38

6 A. That's correct. 11:16:39

7 Q. So what are natural 11:16:40

8 ingredients? 11:16:42

9 A. What I said, i.e., no 11:16:42

10 artificial ingredients. 11:16:47

11 Q. So a natural ingredient is one 11:16:55

12 that is not an artificial ingredient? 11:16:58

13 A. That's my understanding based 11:17:00

14 on plaintiffs' allegation, yes. 11:17:02

15 Q. Did you do any additional 11:17:04

16 research to determine what a natural 11:17:10

17 ingredient was? 11:17:12

18 A. I am not a chemist. That's 11:17:13

19 outside the scope of my assignment. But 11:17:15

20 this is the allegation that plaintiffs 11:17:21

21 have made and I was simply testing their 11:17:23

22 allegation. 11:17:25

23 Q. Okay. And what is an 11:17:25

24 artificial ingredient? 11:17:31

25 A. It's my understanding it's one 11:17:32



1 BRIAN SOWERS

2 that is, something that is synthetic or 11:17:34

3 chemically processed. 11:17:39

4 Q. What does synthetic mean? 11:17:46

5 A. Artificial. Not natural. 11:17:48

6 Q. So help me out here, sir. A 11:17:54

7 natural ingredient is one that is not 11:18:10

8 artificial; is that your testimony? 11:18:13

9 A. That's my understanding based 11:18:13  
10 on plaintiffs' allegations, yes. 11:18:14

11 Q. An artificial ingredient is one 11:18:20  
12 that is not synthetic? 11:18:22

13 A. No, an artificial ingredient is 11:18:23  
14 one that is synthetic or chemically 11:18:26  
15 processed. 11:18:29

16 Q. Apologies. So an artificial 11:18:30  
17 ingredient is one that is synthetic? 11:18:32

18 A. That is my understanding, yes. 11:18:34

19 Q. And a synthetic ingredient is 11:18:36  
20 one that is artificial or not natural? 11:18:38

21 A. Artificial. 11:18:44

22 Q. Okay. Anything else, sir? 11:18:44

23 A. That's my understanding. 11:18:49

24 Q. And what's a chemically 11:18:55  
25 processed ingredient? 11:18:56

1 BRIAN SOWERS

2 A. Again, I am not a chemist. 11:18:58

3 This is based on my understanding of the 11:19:01

4 facts of the case. But one that goes 11:19:03

5 through a process in which the chemical 11:19:05

6 compound is broken down into a different 11:19:08

7 type of compound. 11:19:11

8 Q. I understand that you're not a 11:19:18

9 scientist. So are you saying that there 11:19:20

10 is a change in chemical structure, and 11:19:28

11 that's what chemical processing is? 11:19:31

12 MS. WESTCOT: Objection to form. 11:19:35

13 This is outside the scope of 11:19:36

14 Mr. Sowers's report. 11:19:38

15 A. Yeah. It's really just based 11:19:40

16 on my understanding of the facts. I have 11:19:43

17 done no research on what that is. But 11:19:45

18 it's my understanding that it takes a 11:19:47

19 chemical compound and through a process 11:19:49

20 of something turns it into a different 11:19:51

21 type of compound. 11:19:54

22 Q. Okay. So I'm asking because 11:19:59

23 your testimony today is that an 11:20:00

24 artificial ingredient is one that is 11:20:04

25 chemically processed? 11:20:07

1 BRIAN SOWERS

2 MS. WESTCOT: Objection. 11:20:08

3 Q. I am asking you what you mean 11:20:10  
4 by that? 11:20:11

5 MS. WESTCOT: Objection to form. 11:20:12

6 Asked and answered. Misstates his 11:20:13  
7 prior testimony. 11:20:14

8 A. It's my understanding that an 11:20:18  
9 artificial ingredient is one that is 11:20:20  
10 synthetic or has been chemically 11:20:22  
11 processed. 11:20:24

12 Q. Okay. And I am just trying to 11:20:25  
13 understand, sir, what you mean when you 11:20:27  
14 say "chemically processed"? 11:20:28

15 MS. WESTCOT: Objection. Asked 11:20:30  
16 and answered. 11:20:31

17 A. It's my understanding, I am not 11:20:32  
18 providing an opinion in my report on what 11:20:34  
19 chemically processed is. It's simply my 11:20:37  
20 understanding from the complaint that 11:20:38  
21 it's a process in which a chemical 11:20:42  
22 compound is broken down and transformed 11:20:44  
23 into some other type of compound. 11:20:47

24 That may not be the accurate 11:20:49  
25 statement, but that's my non-scientific 11:20:50

1 BRIAN SOWERS

2 understanding of what it is. That that 11:20:53

3 would be considered artificial. 11:20:58

4 Q. So did you do any additional 11:21:00

5 research to determine what a natural 11:21:04

6 ingredient is other than reading the 11:21:06

7 complaint? 11:21:08

8 A. I think the complaint lays out 11:21:09

9 the allegation that plaintiffs have made 11:21:16

10 here. I am testing the allegations 11:21:18

11 alleged in the complaint. So I am using 11:21:20

12 that as the facts of the case. 11:21:22

13 Q. Okay. And so how did you test 11:21:24

14 the allegation about what natural 11:21:28

15 ingredient means? 11:21:34

16 A. Well, I tested natural 11:21:34

17 ingredient, i.e., no artificial 11:21:41

18 ingredients. So my surveys answer that 11:21:43

19 question. 11:21:46

20 Q. Well, so did you ask consumers 11:21:49

21 what they thought the words "natural 11:21:52

22 ingredients" mean? 11:21:54

23 A. My assignment wasn't to ask 11:21:56

24 consumers what they think "natural" 11:22:01

25 means. My assignment was to test whether 11:22:03

1 BRIAN SOWERS

2 consumers take away the belief that the 11:22:06  
3 products contain only natural 11:22:08  
4 ingredients, that is no artificial 11:22:11  
5 ingredients. 11:22:13

6 Q. I understand that. I guess I 11:22:13  
7 am asking whether you tested whether 11:22:16  
8 consumers believe that natural 11:22:18  
9 ingredients mean no artificial 11:22:20  
10 ingredients? 11:22:25

11 MS. WESTCOT: Objection. Asked 11:22:25  
12 and answered. 11:22:26

13 A. That's what question 5 in both 11:22:27  
14 of my surveys specifically is designed to 11:22:29  
15 do. 11:22:32

16 Q. Other than question 5, did you 11:22:33  
17 ask consumers whether natural ingredients 11:22:39  
18 means artificial ingredients? 11:22:43

19 MS. WESTCOT: Objection. Asked 11:22:45  
20 and answered. 11:22:46

21 A. Question 5 in both surveys is 11:22:47  
22 what I base my opinion on. 11:22:53

23 I guess maybe I don't 11:22:54  
24 understand your question. But those are 11:22:55  
25 the questions I relied on for purposes of 11:22:57

1 BRIAN SOWERS

2 my opinion. 11:22:59

3 Q. I am asking, sir, whether you 11:22:59  
4 relied on anything else? 11:23:01

5 MS. WESTCOT: Objection. Asked 11:23:03  
6 and answered. 11:23:03

7 A. For purposes of my opinion 11:23:04  
8 question 5 is what I base my opinion on. 11:23:08

9 Q. Did you attempt to determine 11:23:34  
10 what consumers believe an artificial 11:23:36  
11 ingredient is? 11:23:38

12 MS. WESTCOT: Objection. Asked 11:23:39  
13 and answered. 11:23:40

14 A. Question 5 covers that. I 11:23:41  
15 guess to the extent you're asking, I 11:23:49  
16 pretested the survey and no one had any 11:23:52  
17 misunderstanding of what I meant by 11:23:54  
18 either "natural" or "artificial," if 11:23:55  
19 that's what you're asking. But for 11:23:57  
20 purposes of my opinion, I rely on 11:23:59  
21 question 5. 11:24:01

22 Q. And did you ask anyone, any 11:24:02  
23 consumers, what they understood 11:24:06  
24 artificial ingredient to mean? 11:24:08

25 A. That's question 5. Artificial 11:24:10

1 BRIAN SOWERS

2 means -- no artificial means only natural 11:24:18

3 inhibitors, that's what's tested in Q5. 11:24:22

4 Q. Other than question 5, did you 11:24:26

5 ask any consumers what they understand 11:24:27

6 the term "artificial ingredient" to mean? 11:24:29

7 MS. WESTCOT: Objection. Asked 11:24:32

8 and answered. 11:24:33

9 A. Again, I pretested both of the 11:24:34

10 surveys. I have no respondents in the 11:24:36

11 pretest indicate that they didn't 11:24:39

12 understand what I meant by it. So there 11:24:41

13 is nothing to suggest that people didn't 11:24:44

14 understand what it meant. 11:24:45

15 Q. Okay. And in your pretest, did 11:24:49

16 you ask the respondents what they 11:24:51

17 understood the term "artificial 11:24:54

18 ingredient" to mean? 11:24:55

19 A. We asked whether there were any 11:24:56

20 questions or wording that they didn't 11:24:59

21 understand or had a hard time answering. 11:25:01

22 No one indicated that they didn't 11:25:04

23 understand what natural or artificial 11:25:05

24 ingredients meant in the pretest. 11:25:07

25 Q. And did you ask them 11:25:09

1 BRIAN SOWERS

2 specifically whether they understood what 11:25:10  
3 those terms mean? 11:25:13

4 A. That's not how a pretest works. 11:25:13  
5 We ask it in a broad way, if there are 11:25:18  
6 any words that they didn't understand. 11:25:20  
7 If they didn't understand natural, 11:25:22  
8 artificial, they could have brought it up 11:25:23  
9 in the pretest. 11:25:25

10 And typically in a pretest, if 11:25:26  
11 someone doesn't understand a term, we ask 11:25:27  
12 what would be a better term to use here, 11:25:29  
13 something that you would have understood. 11:25:32  
14 No one mentioned anything about not 11:25:34  
15 understanding it. So there is no reason 11:25:37  
16 to believe that they didn't. 11:25:38

17 Q. So the answer to my question is 11:25:39  
18 no, you did not ask them specifically 11:25:40  
19 whether they understood what the terms 11:25:43  
20 "natural" or "artificial" or "synthetic" 11:25:45  
21 mean? 11:25:49

22 MS. WESTCOT: Objection. 11:25:49

23 Misstates the testimony. 11:25:50

24 A. Again, the pretest allowed 11:25:53  
25 respondents to indicate if there was 11:25:54



1 BRIAN SOWERS

2 something that they didn't understand. 11:25:56

3 No respondents indicated that they didn't 11:25:58

4 understand what natural meant or what 11:26:01

5 artificial meant. 11:26:02

6 Q. Okay. Let's try this a 11:26:03

7 different way. 11:26:05

8 You disclosed the questions 11:26:07

9 that you asked in the pretest? 11:26:09

10 A. Yes. 11:26:12

11 Q. Okay. And let's go ahead and 11:26:12

12 get those into the record here, just a 11:26:17

13 moment. So I marked as Exhibit 4 to your 11:26:19

14 deposition a document that was produced 11:27:05

15 to us last week. If you can let me know 11:27:08

16 when you have that in front of you, sir. 11:27:11

17 (Sowers Exhibit 4, Pretest for

18 the deodorant survey, was so marked

19 for identification, as of this date.) 11:27:13

20 A. I do. 11:27:13

21 Q. Okay. And so do you recognize 11:27:14

22 Exhibit 4 to your deposition, sir? 11:27:16

23 A. Yes, I do. 11:27:18

24 Q. Okay. What is it? 11:27:19

25 A. These are the pretests for the 11:27:22

1 BRIAN SOWERS

2 deodorant. This is the pretest for the 11:27:26

3 deodorant survey. 11:27:34

4 Q. And so there are six questions 11:27:40  
5 listed here? 11:27:40

6 A. Yes. 11:27:41

7 Q. And you asked those six 11:27:44  
8 questions of each of the respondents? 11:27:46

9 A. Yes. 11:27:48

10 Q. And I said "you." Did you, 11:27:49  
11 yourself, ask these questions or did you 11:27:51  
12 have a supplier do it? 11:27:54

13 A. There was a team at AMS who was 11:27:55  
14 under my direction, but I listened in on 11:28:01  
15 the pretest personally. 11:28:04

16 Q. And there were five respondents 11:28:04  
17 in the pretest? 11:28:11

18 A. There were five respondents for 11:28:11  
19 the deodorant survey and five for the 11:28:14  
20 toothpaste survey. 11:28:17

21 Q. Okay. And you asked the five 11:28:19  
22 deodorant pretest respondents the same 11:28:23  
23 six questions? 11:28:26

24 A. Yes. 11:28:29

25 Q. Okay. And those six questions, 11:28:30

1 BRIAN SOWERS

2 are people who want to participate in 11:47:47

3 surveys and want to be helpful. 11:47:48

4 So they target it to that 11:47:50

5 demographic. People who would be 11:47:52

6 interested in providing their opinions on 11:47:53

7 different topics. 11:47:56

8 Q. And the respondents also get, I 11:48:01

9 think it's something called swag bucks 11:48:03

10 for participating? 11:48:06

11 A. If they qualify and complete 11:48:07

12 the survey, they are given a certain 11:48:09

13 amount of swag bucks, yes. 11:48:11

14 Q. What do you mean by "complete 11:48:13

15 the survey"? 11:48:14

16 A. So some respondents come in, so 11:48:19

17 for example, in this survey, if I am 11:48:20

18 someone who would not purchase natural 11:48:21

19 toothpaste, for example, I wouldn't 11:48:24

20 qualify for this survey so they would get 11:48:26

21 a message that says, "We're sorry, you 11:48:29

22 don't qualify for this survey. Thank you 11:48:31

23 for your time." Those individuals don't 11:48:33

24 receive the compensation. 11:48:39

25 Additionally, anybody who 11:48:40

1 BRIAN SOWERS

2 completes the survey but we scrub for 11:48:42  
3 reasons like they have given nonsensical 11:48:45  
4 responses or other indications that they 11:48:48  
5 weren't following the rules, we tell 11:48:51  
6 Prodege and they don't provide the 11:48:56  
7 incentive and those respondents are also 11:48:57  
8 generally removed from the panel. 11:48:59

9 Q. And I think, if I am 11:49:06  
10 remembering correctly, some of the survey 11:49:07  
11 respondents were filtered out before they 11:49:13  
12 got to question 5? 11:49:15

13 A. That's correct. 11:49:15

14 Q. Do I have that right? 11:49:20

15 A. That's correct. 11:49:21

16 Q. If I was filtered out at 11:49:23  
17 question 3, for example, does that count 11:49:24  
18 as completing the survey? 11:49:26

19 A. It does, yes. 11:49:28

20 Q. If we could just focus again on 11:49:36  
21 your report. I am looking at paragraph 11:49:38  
22 10A? 11:49:49

23 A. Okay. 11:50:04

24 Q. What do you mean by "Net level 11:50:05  
25 of deception"? 11:50:07

1 BRIAN SOWERS

2 A. The net level of deception is 11:50:08  
3 the number when you subtract the amount 11:50:10  
4 of noise from the control, a similar 11:50:13  
5 percentage of noise from the test. 11:50:16

6 So the net deception is the 11:50:18  
7 difference between the test group and the 11:50:20  
8 control group. 11:50:21

9 Q. So let's kind of separate that 11:50:25  
10 out a little bit. 11:50:27

11 What is the test group? 11:50:27

12 A. The test group are the 11:50:28  
13 individuals who saw the Tom's packaging 11:50:31  
14 as it exists in the marketplace, alleged 11:50:34  
15 to be deceptive. 11:50:38

16 Q. And then what's the control 11:50:39  
17 group? 11:50:40

18 A. The control group is 11:50:40  
19 individuals who saw the same packaging, 11:50:43  
20 but for the modifications that I made to 11:50:48  
21 the packaging to correct for the 11:50:51  
22 allegedly deceptive content. 11:50:53

23 Q. So I am just going to summarize 11:50:55  
24 it, but if I got this wrong, just let me 11:50:58  
25 know. I am just trying to be efficient. 11:50:59

1 BRIAN SOWERS

2 So you calculate the percentage 11:51:01  
3 of individuals in the test group who your 11:51:04  
4 survey identified as deceived, and you 11:51:10  
5 subtract that from the percentage of 11:51:15  
6 participants in the control group whom 11:51:18  
7 your survey identified as deceived. And 11:51:22  
8 that's your net level of deception? 11:51:23

9 A. Yes, that's correct. 11:51:25

10 Q. Okay. Thank you. 11:51:26

11 And then you have footnote 5 11:51:36  
12 here on page 4? 11:51:38

13 A. Yes. 11:51:39

14 Q. Are you offering an opinion in 11:51:39  
15 this case on what the net level of 11:51:44  
16 deception would corroborate a finding of 11:51:46  
17 actionable consumer deception? 11:51:51

18 MS. WESTCOT: Objection to form. 11:51:55

19 A. I am not making a legal 11:51:56  
20 conclusion. My footnote is only to 11:51:58  
21 provide a frame of reference for the 11:52:00  
22 trier of fact. 11:52:02

23 Q. So is it your intention, sir, 11:52:04  
24 to testify to the trier of fact that 11:52:07  
25 Courts have found a net deception rate of 11:52:11

1 BRIAN SOWERS

2 15 to 20 percent as corroborating a 11:52:17

3 finding of likely confusion? 11:52:20

4 A. Yes, it is. 11:52:21

5 Q. And do you think that or is it 11:52:25

6 your opinion that a finding of likely 11:52:31

7 confusion in a trademark case is 11:52:36

8 analogous to a finding of deception in a 11:52:40

9 false advertising case? 11:52:44

10 MS. WESTCOT: Objection to form. 11:52:46

11 A. My opinion is based on what 11:52:47

12 Professor McCarthy says are the 11:52:51

13 appropriate thresholds to consider when 11:52:54

14 using a deceptive advertising survey. 11:52:56

15 It's his opinion, and one that 11:53:01

16 I am simply citing to, that the issue of 11:53:02

17 consumer deception from a false 11:53:04

18 advertisement is closely analogous to 11:53:06

19 likely confusion and therefore it's 11:53:09

20 proper to use the percentage figures 11:53:11

21 accepted in likelihood of confusion 11:53:14

22 surveys. I am simply citing to Professor 11:53:15

23 McCarthy. 11:53:19

24 Q. I guess, I think -- I think I 11:53:19

25 am asking the right question here, but 11:53:25

1 BRIAN SOWERS

2 Q. Did you review any of the 12:04:12  
3 academic or other articles or literature 12:04:16  
4 that Dr. Kivetz's cited? 12:04:18

5 A. Some of them I am familiar with 12:04:20  
6 already, so I didn't necessarily review 12:04:23  
7 them. I am aware of them. Some I note 12:04:26  
8 that he, you know -- well, he doesn't 12:04:28  
9 give a full explanation of the document 12:04:34  
10 he's citing to. 12:04:36

11 So again, in response to 12:04:38  
12 Dr. Kivetz's criticisms, there are some 12:04:40  
13 documents that I already know about that 12:04:42  
14 he misstated. 12:04:44

15 Q. And which documents are those? 12:04:48

16 A. I think one of the -- one of 12:04:49  
17 his criticisms was about my use of a 12:04:52  
18 closed-end question versus an open-ended 12:04:55  
19 question. And he writes how -- he cites 12:04:59  
20 to Bruce Keller who wrote a chapter in 12:05:03  
21 Shari Diamond's book on deceptive 12:05:06  
22 advertising surveys. And Mr. Keller 12:05:09  
23 talks about advantages and disadvantages 12:05:15  
24 of open-ended questions. 12:05:18

25 Dr. Kivetz's only mentions the 12:05:19



1 BRIAN SOWERS

2 advantages and not the disadvantages. He 12:05:21  
3 suggests in his report that only open- 12:05:27  
4 ended questions are appropriate for 12:05:29  
5 deceptive advertising surveys and cites 12:05:31  
6 to Mr. Keller. But Mr. Keller actually 12:05:32  
7 says that it's the rare survey that 12:05:36  
8 doesn't asked a closed-end question to 12:05:38  
9 get at the ultimate issue. And that if 12:05:41  
10 it's asked after the filtering and 12:05:44  
11 funneling of open-ended questions, the 12:05:45  
12 Courts will generally accept that as 12:05:47  
13 evidence of confusion. 12:05:48

14 So there is just certain things 12:05:50  
15 he omits in his criticisms of my survey 12:05:52  
16 that I would certainly cite to in 12:05:55  
17 response. 12:05:57

18 Q. So other than this chapter from 12:06:00  
19 Professor Keller, were there any other 12:06:04  
20 documents that you would like to address 12:06:08  
21 that were cited in Dr. Kivetz's report? 12:06:17

22 MS. WESTCOT: Objection to form. 12:06:21

23 A. I think, again, in response to 12:06:22  
24 Dr. Kivetz's specific criticisms, he 12:06:27  
25 cites to Dr. Jacobi, for example. But 12:06:31

1 BRIAN SOWERS

2 again, he doesn't -- he, again, I believe 12:06:33  
3 talks about Dr. Jacobi's, the advantages 12:06:35  
4 of open-ended questions. But he doesn't 12:06:39  
5 provide the disadvantages of open-ended 12:06:41  
6 questions. I would certainly cite to 12:06:43  
7 that in response to Dr. Kivetz's critique 12:06:45  
8 of my survey. 12:06:49

9 Q. Are there any other articles or 12:06:54  
10 publications that Dr. Kivetz's cited in 12:06:56  
11 his report, in his rebuttal report, that 12:07:01  
12 you would like to address? 12:07:05

13 A. I think those are the two. 12:07:06  
14 Nothing else comes to mind as I sit here. 12:07:13

15 Q. Okay. And did you read -- I 12:07:14  
16 guess let me take a step back. 12:07:22

17 I think you mentioned you were 12:07:23  
18 familiar with some of the articles and 12:07:27  
19 treatises that Dr. Kivetz cited; is that 12:07:28  
20 correct? 12:07:32

21 A. That's correct. 12:07:32

22 Q. So there were some that you 12:07:33  
23 weren't familiar with? 12:07:35

24 A. That's correct, yeah. 12:07:36

25 Q. Have you looked at those 12:07:42

1 BRIAN SOWERS

2 articles and publications? 12:07:43

3 A. No, I have not because I 12:07:44

4 disagreed with his criticisms overall. 12:07:46

5 And generally where he had the 12:07:48

6 criticisms, I could point to more 12:07:54

7 relevant literature for surveys for 12:07:55

8 litigation and response, so no. 12:07:58

9 Q. When you were constructing and 12:08:08

10 executing your surveys in this case, did 12:08:10

11 you look for any published or academic 12:08:13

12 research on consumer responses to natural 12:08:15

13 claims on packaged goods? 12:08:19

14 A. I don't believe that I did, no. 12:08:21

15 Not specifically to those. 12:08:28

16 The survey I constructed was 12:08:29

17 more to test deceptive advertising, not 12:08:31

18 limited to one particular type of product 12:08:33

19 or claim. 12:08:36

20 Q. Well, I just want to make sure 12:08:44

21 I understand. Your objective was to test 12:08:46

22 consumer perception of the natural claim 12:08:49

23 on Tom's package; is that correct? 12:08:52

24 A. It was to test whether 12:08:55

25 consumers take away a belief that it 12:08:58

1 BRIAN SOWERS

2 communicates that the products contain 12:09:01  
3 only natural ingredients and no 12:09:01  
4 artificial ingredients, that's correct. 12:09:05

5 Q. And in constructing and 12:09:07  
6 executing your tests, you did not 12:09:08  
7 consider any academic or other published 12:09:14  
8 research on how consumers respond to 12:09:16  
9 natural claims on consumer packaged 12:09:21  
10 goods? 12:09:23

11 MS. WESTCOT: Objection. 12:09:23

12 Misstates the witness's testimony. 12:09:24

13 A. Again, for the survey 12:09:26  
14 construction, the survey needs to follow 12:09:27  
15 generally accepted survey principles, 12:09:29  
16 which mine follow for testing deceptive 12:09:32  
17 advertising. That applies regardless of 12:09:34  
18 the product type or the category type. 12:09:38  
19 So that's what I focused on. 12:09:42

20 Q. And what's the answer to my 12:09:43  
21 question, sir? 12:09:44

22 MS. WESTCOT: Objection. 12:09:45

23 Argumentative. Asked and answered. 12:09:49

24 A. I relied upon the research to 12:09:49  
25 developing generally accepted survey 12:09:51

1 BRIAN SOWERS

2 methodologies for testing deceptive 12:09:54  
3 advertising surveys. For purposes of the 12:09:56  
4 natural claim, those surveys are the same 12:09:58  
5 regardless of the product type or the 12:10:01  
6 category. 12:10:03

7 Q. So I will ask one more time and 12:10:09  
8 your answer will be what your answer is 12:10:11  
9 and we can deal with the Court. 12:10:13

10 In constructing and executing 12:10:14  
11 your test, you did not research how 12:10:16  
12 consumers respond to "natural" claims on 12:10:19  
13 consumer packaged goods by referring to, 12:10:22  
14 for example, publications or academic 12:10:25  
15 research on consumer responses to 12:10:29  
16 "natural" claims; is that correct? 12:10:31

17 MS. WESTCOT: Objection to form. 12:10:34

18 Asked and answered. Argumentative. 12:10:34

19 A. Again, my survey is a deceptive 12:10:38  
20 advertising survey. I followed best 12:10:41  
21 practices for conducting surveys for 12:10:42  
22 litigation, deceptive advertising 12:10:44  
23 specifically. Regardless of the product 12:10:46  
24 or claim type at issue, those surveys 12:10:47  
25 follow the same general pattern. 12:10:49

1 BRIAN SOWERS

2 Q. Is the answer to my question 12:10:53  
3 then no? 12:10:55

4 MS. WESTCOT: Objection. 12:10:56

5 Argumentative. Mr. Savaresse, just 12:10:56

6 because you don't like his answer 12:11:00

7 doesn't mean he hasn't answered the 12:11:02

8 question. He answered the question 12:11:04

9 multiple times now. 12:11:06

10 Q. You can answer. 12:11:06

11 A. Again, regardless of the 12:11:07

12 product type or category or claim, what I 12:11:08

13 followed was the proper protocol for 12:11:10

14 testing deceptive advertising claims per 12:11:12

15 the relevant research. 12:11:14

16 Q. I have not asked you about the 12:11:18

17 proper protocol for testing deceptive 12:11:19

18 advertising claims. I asked you whether 12:11:22

19 you considered academic research about 12:11:23

20 consumer perceptions of natural claims. 12:11:26

21 And you have not answered that question. 12:11:28

22 So I am going to move on. We can deal 12:11:30

23 with the Court. 12:11:34

24 MS. WESTCOT: Mr. Savaresse, he 12:11:34

25 answered your question multiple times. 12:11:35

1 BRIAN SOWERS

2 Q. Did you receive drafts of any 12:11:42  
3 reports from other experts retained by 12:11:44  
4 plaintiffs in this case? 12:11:47

5 A. No, I did not. 12:11:49

6 Q. Have you received final 12:11:51  
7 versions of any reports? 12:11:52

8 A. No, I haven't. 12:11:53

9 Q. Are you aware that plaintiffs 12:11:57  
10 have submitted reports by other purported 12:11:59  
11 experts? 12:12:05

12 A. Only from what I read in the 12:12:05  
13 motion for class certification. But 12:12:09  
14 beyond that, I don't know the scope or 12:12:11  
15 what the results were. 12:12:12

16 Q. Okay. And subsequent to the 12:12:13  
17 class certification motion and order, are 12:12:17  
18 you aware of whether plaintiffs have 12:12:20  
19 retained and issued or submitted reports 12:12:23  
20 by other purported experts? 12:12:27

21 MS. WESTCOT: Objection to form. 12:12:30

22 A. I am not aware, no. 12:12:31

23 MR. SAVARESSE: So we have been 12:12:36  
24 going a little more than an hour now. 12:12:37

25 Is this a good time for us to take a 12:12:39

1 BRIAN SOWERS

2 "No Opinion" or "I Don't Know/Unsure," 13:39:51  
3 which captures everything else, if they 13:39:52  
4 didn't take away that perception. 13:39:55

5 Q. How did you decide to include 13:40:05  
6 those five answers for closed-ended 13:40:06  
7 question 5? 13:40:12

8 A. The "contain only natural 13:40:12  
9 ingredients (i.e., no artificial 13:40:14  
10 ingredients)" was included because that's 13:40:16  
11 actually, you know, that's the measure of 13:40:18  
12 deception in the survey. 13:40:19

13 The second one is "contains 13:40:24  
14 some natural ingredients and some 13:40:25  
15 artificial ingredients," because that's 13:40:27  
16 what I understand plaintiffs to say 13:40:29  
17 should be listed. That there are some 13:40:31  
18 natural ingredients and some unnatural 13:40:33  
19 ingredients. 13:40:35

20 And the third one was included 13:40:36  
21 because I needed to include it to make 13:40:40  
22 sure that the list of options was 13:40:41  
23 exhaustive. If I had only said contains 13:40:43  
24 only or contains some, that could, people 13:40:45  
25 could assume that it must contain at 13:40:48



1 BRIAN SOWERS

2 least some natural ingredients when that 13:40:50

3 may not be their takeaway. 13:40:52

4 Q. Well, you didn't include the 13:40:59

5 option "contains mostly natural 13:41:01

6 ingredients," right? 13:41:04

7 A. Well, if someone saw "mostly," 13:41:05

8 I think they would have selected 13:41:08

9 "contains some." Or if they thought 13:41:09

10 "mostly" and none of those response 13:41:11

11 options covered that, they had the option 13:41:13

12 to choose "No Opinion" or "Don't 13:41:17

13 Know/Unsure." 13:41:19

14 Q. That's not the question I 13:41:19

15 asked, sir. I mean, the question says 13:41:20

16 what it says. There is no option for a 13:41:23

17 survey respondent to have selected 13:41:26

18 contains mostly natural ingredients, 13:41:28

19 right? 13:41:30

20 MS. WESTCOT: Objection. Asked 13:41:30

21 and answered. 13:41:31

22 A. I mean, there is not a response 13:41:32

23 option that says you can purchase it only 13:41:34

24 on the moon either. I think you're 13:41:35

25 limited by certain response options to 13:41:37

1 BRIAN SOWERS

2 make it manageable for consumers. 13:41:39

3 If a respondent truly thought 13:41:42

4 that it contains mostly natural 13:41:44

5 ingredients and didn't feel like any of 13:41:46

6 these response options covered it, they 13:41:48

7 would have put "Don't Know/Unsure." 13:41:49

8 That's exactly what that question is for. 13:41:51

9 Q. And how did you determine to 13:41:57

10 associate natural ingredients with no 13:42:03

11 artificial ingredients? 13:42:07

12 A. It's my understanding that that 13:42:08

13 is plaintiffs' obligation. They took 13:42:15

14 away when they purchased the product that 13:42:18

15 it contained only natural ingredients, 13:42:21

16 that is no artificial ingredients. 13:42:23

17 That's the hypothesis that I am testing 13:42:25

18 in the survey. 13:42:27

19 Q. And that's the only basis for 13:42:28

20 associating artificial ingredients 13:42:33

21 with -- no artificial ingredients with 13:42:39

22 natural ingredients? 13:42:43

23 A. I think we talked about this 13:42:44

24 before. What does "artificial" mean. 13:42:45

25 It's my understanding that it's synthetic 13:42:47

1 BRIAN SOWERS

2 or chemically processed. It's language 13:42:49  
3 that is included in the complaint. But I 13:42:53  
4 understand that to be synonymous with no 13:42:57  
5 artificial ingredients. So that's the 13:42:59  
6 allegation that I tested. 13:43:02

7 Q. Right. I may have 13:43:03  
8 misunderstood your testimony earlier. 13:43:06  
9 But it's my understanding that, that you 13:43:08  
10 based your hypothesis here and the 13:43:11  
11 association between artificial or no 13:43:15  
12 artificial ingredients and natural 13:43:17  
13 ingredients based solely on the 13:43:20  
14 complaint. You didn't do additional 13:43:22  
15 research; is that right? 13:43:24

16 A. That's correct. I am testing 13:43:25  
17 plaintiffs' allegation here. So the 13:43:27  
18 complaint lays out the allegation in this 13:43:29  
19 matter. I've tested that allegation, as 13:43:30  
20 I understand it. 13:43:33

21 Q. And for question 5, there was 13:43:33  
22 no way for consumers to include an answer 13:43:42  
23 different from one of the five that you 13:43:46  
24 provided here, right? 13:43:47

25 A. No. These are their only five 13:43:48

1 BRIAN SOWERS

2 options. But like I said, important 13:43:54  
3 thing is that if a consumer took away a 13:43:55  
4 perception different than the first three 13:43:58  
5 response options, they had the option to 13:44:00  
6 select "No Opinion" or "Don't 13:44:03  
7 Know/Unsure." 13:44:05

8 Q. And the results of question 5 13:44:05  
9 are the basis for your ultimate opinion 13:44:14  
10 about the level of or the net level of 13:44:17  
11 deception in this case? 13:44:20

12 A. That's correct. 13:44:23

13 Q. Did you consider including as 13:44:37  
14 one of the answers to question 5 contains 13:44:39  
15 ingredients that are naturally sourced or 13:44:43  
16 naturally derived? 13:44:46

17 A. I didn't test that. That 13:44:47  
18 wasn't what I was asked to test, whether 13:44:52  
19 their perceptions were that. 13:44:55

20 Again, if respondents took away 13:44:57  
21 that message or only that message, they 13:44:58  
22 had the option to select "No Opinion" or 13:45:00  
23 "Don't Know/Unsure" in response to the 13:45:02  
24 question. 13:45:04

25 Q. So that was the only way for 13:45:04

1 BRIAN SOWERS

2 them to answer? 13:45:07

3 A. I mean, two out of the five 13:45:11

4 response options allow them to select 13:45:16

5 something to suggest that the first three 13:45:18

6 don't correspond to any takeaway they 13:45:22

7 took away from the packaging. 13:45:24

8 Q. Okay. Well, does the packaging 13:45:26

9 say "no artificial ingredients"? 13:45:30

10 A. Well, it's my understanding -- 13:45:34

11 it says "natural." It's my understanding 13:45:39

12 that plaintiffs allege that that implies 13:45:40

13 that it contains only natural 13:45:45

14 ingredients, which is no artificial 13:45:47

15 ingredients. 13:45:49

16 Q. Okay. 13:45:50

17 MS. WESTCOT: We have been going 13:46:13

18 about an hour, when we get to a good 13:46:15

19 stopping point, can we take a short 13:46:18

20 break? 13:46:19

21 MR. SAVARESE: Now is fine. 13:46:20

22 THE VIDEOGRAPHER: We are now 13:46:22

23 going off the record at approximately 13:46:23

24 1:46 p.m. 13:46:24

25 (Off the record.) 13:52:14

1 BRIAN SOWERS

2 THE VIDEOGRAPHER: We are now 13:58:39  
3 going back on the record at 13:58:40  
4 approximately 1:58 p.m., beginning of 13:58:41  
5 media four. Go ahead, sir. 13:58:43

6 MR. SAVARESE: All right. So 13:58:45  
7 we're back on the record here. 13:58:47  
8 Welcome back everyone. 13:58:49

9 While we were on break there was 13:58:51  
10 an issue that arose for plaintiffs' 13:58:54  
11 counsel, Ms. Sarah Westcot. So 13:59:00  
12 plaintiffs are subbing in attorneys. 13:59:04  
13 And Stephen, I will just allow you to 13:59:09  
14 make your appearance. 13:59:12

15 MR. BECK: Stephen Beck for 13:59:13  
16 plaintiffs from Bursor & Fisher. 13:59:15

17 MR. SAVARESE: All right. So 13:59:18  
18 with that, Stephen, and Mr. Sowers, I 13:59:20  
19 think we'll get back into it. 13:59:22

20 BY MR. SAVARESE:

21 Q. And we are looking at Exhibit 3 13:59:24  
22 to your deposition, Mr. Sowers. That's a 13:59:30  
23 copy of your report with the appendices. 13:59:34

24 A. Yes. 13:59:37

25 Q. I just want to start again with 13:59:41

1 BRIAN SOWERS

2 Opinion" in response to question 5, did 14:15:29  
3 you ask them whether they shared the same 14:15:34  
4 definition of "natural" as the one 14:15:36  
5 provided in question 5? 14:15:37

6 A. I don't believe anybody 14:15:39  
7 selected "Don't Know" or "Unsure" or "No 14:15:41  
8 Opinion" in the pretest. If they had, I 14:15:43  
9 would have asked. But again, they had 14:15:45  
10 the opportunity to bring it up and 14:15:48  
11 didn't. 14:15:50

12 So there is nothing, again, 14:15:50  
13 nothing in my data, nothing from my 14:15:52  
14 pretest to suggest that people didn't 14:15:54  
15 understand what I was talking about. 14:15:57

16 Q. All right. I want to talk 14:15:59  
17 about the control packaging. So there is 14:16:13  
18 an image of that on page 11 for the 14:16:19  
19 toothpaste. 14:16:23

20 A. Okay. 14:16:29

21 Q. And page 24 for the deodorant. 14:16:30

22 So what's the difference 14:16:36  
23 between the test toothpaste packaging and 14:16:39  
24 the control toothpaste packaging? 14:16:42

25 A. The test packaging has just 14:16:45

1 BRIAN SOWERS

2 simply the "natural" representation. The 14:16:48  
3 difference is for the control I replaced 14:16:51  
4 "natural" with "contains some natural 14:16:54  
5 ingredients," and provided an explicit 14:16:56  
6 definition of what "natural" means. 14:16:58

7 Q. Okay. Did you make any other 14:17:03  
8 changes to the control packaging versus 14:17:05  
9 the test packaging for the toothpaste? 14:17:09

10 A. No. They were completely the 14:17:11  
11 same except for those changes. 14:17:13

12 Q. Why didn't you make any other 14:17:14  
13 changes? 14:17:16

14 A. It's the "natural" 14:17:16  
15 representation that I'm measuring 14:17:19  
16 perceptions of. So I created my control 14:17:21  
17 condition to convey the information 14:17:28  
18 plaintiff alleges should have been 14:17:33  
19 conveyed in order to test to control for 14:17:34  
20 that element. 14:17:38

21 Q. Got it. So it's just the -- 14:17:39  
22 the only thing you tested for was the 14:17:42  
23 "natural" representation on the front of 14:17:45  
24 the toothpaste packaging, right? 14:17:48

25 A. That's correct. Everything 14:17:51



1 BRIAN SOWERS

2 else was completely the same. 14:17:51

3 Q. Okay. And then is that also 14:17:53  
4 true for the deodorant, that's the only 14:17:55  
5 thing that you tested was the "natural" 14:17:58  
6 representation on the front of the 14:18:00  
7 deodorant packaging? 14:18:03

8 A. Well, I controlled for that, 14:18:03  
9 but yes, yeah. 14:18:05

10 Q. Okay. And so you mentioned 14:18:06  
11 that you changed some of the wording, 14:18:10  
12 right, from "natural" to "contains some 14:18:13  
13 natural ingredients" and then there is 14:18:16  
14 the little asterisks disclosure? 14:18:18

15 A. Yes. 14:18:21

16 Q. You didn't just change the 14:18:21  
17 words, right? 14:18:23

18 A. I'm sorry, can you clarify? I 14:18:24  
19 am not sure I understood your question. 14:18:29

20 Q. Well, you didn't just change 14:18:30  
21 the wording; isn't that right? 14:18:32

22 A. Well, I replaced the word 14:18:33  
23 "natural" with a definition that 14:18:38  
24 plaintiff alleges is what should have 14:18:39  
25 been communicated. 14:18:41

1 BRIAN SOWERS

2 Q. Okay. Well, you also changed 14:18:42

3 the color? 14:18:46

4 A. Yes. 14:18:46

5 Q. So on the toothpaste packaging, 14:18:47

6 the word "natural" is the same color as 14:18:50

7 "with fluoride"? 14:19:00

8 A. Yes. 14:19:01

9 Q. And in your packaging, you 14:19:05

10 changed it to red? 14:19:07

11 A. That's correct. 14:19:08

12 Q. Why did you do that? 14:19:09

13 A. It allows me to -- again, 14:19:10

14 plaintiffs' allegation is that 14:19:14

15 individuals are going to take away a 14:19:17

16 belief that the product contains only 14:19:18

17 natural ingredients, i.e., no artificial 14:19:20

18 ingredients. So what I need to control 14:19:23

19 for is how many people would take away 14:19:25

20 that belief even if Tom's splashed it on 14:19:27

21 front of their product packaging. So I 14:19:30

22 put it in there in a way so that it's 14:19:33

23 clearly communicated as plaintiffs allege 14:19:35

24 it should have been all along. 14:19:38

25 Q. So is it the same answer for 14:19:45

1 BRIAN SOWERS

2 the deodorant packaging, you changed the 14:19:47  
3 coloring to red to draw attention to that 14:19:49  
4 representation? 14:19:55

5 A. Well, I wouldn't say draw 14:19:55  
6 attention to it. I put it to clearly 14:19:58  
7 communicate is what I did. 14:20:01

8 Q. I think you said splashed it on 14:20:03  
9 the front of their product packaging? 14:20:06

10 A. Yeah, so it's really, thinking 14:20:07  
11 about a test and a control, part of noise 14:20:09  
12 is someone will always -- even if Tom's 14:20:10  
13 put this information on the front of the 14:20:17  
14 packaging, there are likely some 14:20:19  
15 percentage of people that would still 14:20:21  
16 say, "Yes, I think it's all natural, no 14:20:23  
17 artificial ingredients" even with that 14:20:25  
18 information.

19 So what I am doing is 14:20:27  
20 controlling for the people who would have 14:20:28  
21 said that, even if Tom's had put it 14:20:30  
22 prominently on the front of the package. 14:20:34

23 Q. And you also made it all caps? 14:20:44

24 A. Yes. 14:20:48

25 Q. And you underlined the word 14:20:48

1 BRIAN SOWERS

2 "some"? 14:20:50

3 A. Yes. 14:20:50

4 Q. And did you make those changes 14:20:51  
5 for the same reason? 14:20:53

6 A. Again, yes, it's controlling 14:20:57  
7 for what plaintiffs claim should have 14:20:58  
8 been communicated all along. That's what 14:21:00  
9 the control is doing. 14:21:02

10 Q. Well, is the same thing true 14:21:20  
11 for the asterisks disclosure, "Contains 14:21:41  
12 one or more artificial ingredients"? 14:21:44

13 A. I'm sorry, is the same true of 14:21:49  
14 what? 14:21:51

15 Q. That you included that in red 14:21:52  
16 lettering to test what consumer 14:21:54  
17 perception would be if that disclosure 14:22:00  
18 were displayed prominently on the 14:22:03  
19 packaging? 14:22:06

20 A. Not to control for. To control 14:22:07  
21 for what perceptions would be even if 14:22:09  
22 that was clearly communicated on the 14:22:11  
23 packaging. 14:22:12

24 Q. I think you mentioned this, but 14:22:31  
25 there was some percentage of respondents 14:22:33

1 BRIAN SOWERS

2 who believed that the controlled 14:22:42  
3 packaging communicated that the product 14:22:43  
4 contained only natural ingredients even 14:22:45  
5 though you included the language in red 14:22:49  
6 on the package? 14:22:57

7 A. That's correct. 14:23:03

8 Q. It's about a third of 14:23:03  
9 respondents? 14:23:05

10 A. Yes, it's 33.5 percent in 14:23:05  
11 control group for the toothpaste. And 14:23:09  
12 for the deodorant it is 38.5 percent. 14:23:12

13 Q. 38.5? 14:23:26

14 A. Yes. 14:23:27

15 Q. Did it concern you at all that 14:23:33  
16 a third or more of respondents selected 14:23:37  
17 "contains only natural ingredients" in 14:23:42  
18 response to the control? 14:23:45

19 A. No, the exact opposite, 14:23:47  
20 actually. I think it confirmed that I 14:23:51  
21 had a strong control doing exactly what 14:23:52  
22 it was designed to do, which is to pick 14:23:55  
23 up noise. 14:23:57

24 Q. So what noise do you think you 14:24:00  
25 picked up? 14:24:02

1 BRIAN SOWERS

2 A. 33.5 percent in the toothpaste. 14:24:02  
3 It's impossible to parse out what exactly 14:24:06  
4 the noise is. It could be people 14:24:08  
5 guessing. It could be people who weren't 14:24:09  
6 paying attention to the question. It 14:24:12  
7 could have been a whole host of things. 14:24:18  
8 It's really just noise and that's all 14:24:21  
9 it's intended to capture. 14:24:22

10 Q. Okay. And one of the answers 14:24:24  
11 to question 5 is "contains some natural 14:24:29  
12 ingredients and some artificial 14:24:36  
13 ingredients," right? 14:24:38

14 A. Yes. 14:24:40

15 Q. And the language that you added 14:24:43  
16 to the control stimulus is "contains some 14:24:46  
17 natural ingredients"? 14:24:51

18 A. Yes, that's correct. 14:24:51

19 Q. So in the toothpaste survey, 47 14:25:02  
20 percent of respondents remembered that 14:25:12  
21 the packaging said "contains some natural 14:25:18  
22 ingredients" and selected that response 14:25:21  
23 to question 5? 14:25:24

24 A. Well, I don't think that's 14:25:25  
25 fair. "Contains some natural ingredients 14:25:27

1 BRIAN SOWERS

2 and some artificial ingredients." So 14:25:28  
3 47.1 percent of responses to the control 14:25:31  
4 group took away that impression from the 14:25:34  
5 packaging, yes. 14:25:36

6 Q. From the red all capitalized 14:25:37  
7 and underlined stimulus that you 14:25:41  
8 designed? 14:25:46

9 A. Yes, that's correct. 14:25:46

10 Q. And that control stimulus also 14:25:51  
11 says "contains one or more artificial 14:25:53  
12 ingredients"? 14:25:55

13 A. Yes. 14:25:56

14 Q. So let's talk about question 1 14:26:30  
15 of your survey. "What was the main 14:26:33  
16 message communicated to you by the 14:26:39  
17 product packaging?" Right? 14:26:40

18 A. Yes. 14:26:45

19 Q. You ask the same question for 14:26:45  
20 toothpaste and deodorant respondents? 14:26:48

21 A. Yes, I did. 14:26:51

22 Q. Same question for the test and 14:26:52  
23 the control? 14:26:54

24 A. Yeah. 14:26:54

25 Q. Would you agree with me that's 14:26:55

1 BRIAN SOWERS

2 an open-ended question? 14:26:57

3 A. Yes, it is. 14:26:58

4 Q. Why did you ask that question? 14:26:59

5 A. For deceptive advertising 14:27:02

6 surveys they follow what's called the 14:27:04

7 traditional filter and funnel approach. 14:27:06

8 And the literature on surveys for 14:27:10

9 deceptive advertising surveys say that 14:27:12

10 you always start at the top of the filter 14:27:15

11 with a broad open-ended question about 14:27:18

12 what was the main message of the 14:27:19

13 advertisement. 14:27:21

14 Q. Okay. And you coded or your 14:27:22

15 team coded responses to question 1? 14:27:29

16 A. Yes. 14:27:31

17 Q. Those were the verbatim 14:27:32

18 responses that we were looking at 14:27:33

19 earlier? 14:27:36

20 A. That's correct. 14:27:36

21 Q. So what did your team code for? 14:27:38

22 A. Really just how many people 14:27:42

23 mentioned anything about natural, the 14:27:45

24 natural representation in general, versus 14:27:47

25 everything else. 14:27:51



1 BRIAN SOWERS

2 Q. And did you look at any 14:28:00  
3 responses not related to the natural 14:28:01  
4 representation? 14:28:05

5 A. If it wasn't related -- if it 14:28:06  
6 didn't mention "natural" or anything 14:28:08  
7 about the natural representation, it was 14:28:09  
8 just coded as "other," which in the 14:28:11  
9 report says no mention of a natural 14:28:13  
10 representation. 14:28:15

11 Q. Did you look for any specific 14:28:27  
12 language to code for "natural"? 14:28:28

13 A. No. I think, you know, it's 14:28:32  
14 really -- this is just the top of the 14:28:34  
15 funnel. As the literature says, it sets 14:28:37  
16 the stage for more detailed closed-end 14:28:42  
17 questions which are the focus of test. 14:28:47

18 So for purposes of my opinion, 14:28:48  
19 it doesn't really matter what they say in 14:28:50  
20 question 1 or 2, as long as it's not 14:28:52  
21 gibberish, which I removed from the data 14:28:56  
22 set. I am not forming any opinions based 14:28:58  
23 on question 1 and 2. 14:29:00

24 Q. Is there a reason why you 14:29:09  
25 didn't form any opinions based on the 14:29:11

1 BRIAN SOWERS

2 responses to questions 1 and 2? 14:29:12

3 A. They are such broad questions. 14:29:13

4 They were never designed to answer the 14:29:18

5 research question. They are really only 14:29:20

6 used to filter and funnel down to the 14:29:22

7 closed-end question. Even if someone 14:29:24

8 didn't take away something about 14:29:27

9 "natural" as the main message, that 14:29:29

10 doesn't mean that they didn't take it 14:29:31

11 away as a message overall. 14:29:33

12 So like I said, it's really not 14:29:35

13 designed to answer the relevant research 14:29:37

14 question. And it's just simply a tool to 14:29:39

15 filter and funnel to Q5. 14:29:41

16 Q. Okay. So the second question 14:29:43

17 was "What other messages, if any, were 14:29:45

18 communicated to you by the product 14:29:48

19 packaging?" Right? 14:29:49

20 A. Yes. 14:29:52

21 Q. So why did you ask that 14:29:52

22 question? 14:29:54

23 A. Again, in following best 14:29:54

24 practices, which, you know, establishes 14:29:56

25 that you ask what is the main message 14:30:00

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2 question and then you ask a follow-up 14:30:02  
3 question, just to allow people to add any 14:30:03  
4 other thoughts to probe if there was 14:30:06  
5 something that maybe they forgot or 14:30:07  
6 wanted to add in response, that once they 14:30:10  
7 got to that question they said, "Oh, and 14:30:12  
8 I also took away this impression." 14:30:14

9 Q. But the answers to those two 14:30:18  
10 questions were not relevant to your 14:30:20  
11 analysis; is that fair? 14:30:21

12 A. That's exactly. It's really 14:30:22  
13 just used to begin the filtering and 14:30:25  
14 funneling process down to Q5. 14:30:27

15 Q. Okay. Do you know, the chart 14:30:29  
16 that you have on page 17 here, lumps the 14:30:35  
17 question 1 and question 2 responses 14:30:40  
18 together. Do you know how many survey 14:30:42  
19 respondents mentioned something about the 14:30:47  
20 "natural" representation in response to 14:30:49  
21 question 1? 14:30:54

22 A. I don't recall. You know, it's 14:30:54  
23 in the data. I can look, but I don't 14:30:56  
24 recall as I sit here. 14:30:57

25 Q. Where is that data? 14:30:58

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2 A. When we were looking at the 14:31:04  
3 Excel sheet before, it would be the 14:31:06  
4 difference between question 1 and 14:31:07  
5 question 2. 14:31:09

6 Q. So to find out, I would look at 14:31:15  
7 the verbatim responses to question 1 and 14:31:17  
8 see who mentions "natural"? 14:31:19

9 A. Yeah, you could look to see how 14:31:24  
10 many mention in question 1 and then if 14:31:27  
11 they don't, then they should be in 14:31:29  
12 question 2, and you could parse it out 14:31:31  
13 that way. 14:31:33

14 Q. When you say something about 14:31:35  
15 the natural representation, do you mean 14:31:36  
16 just the word "natural," like if that 14:31:37  
17 appears in one of the verbatims to 1 or 14:31:39  
18 2, in the "Yes" column, and if they 14:31:41  
19 don't, then they are in the "No" column? 14:31:47

20 A. The problem is, and we'll get 14:31:51  
21 into this I'm sure, a lot of the 14:31:52  
22 open-ended responses are vague. That's a 14:31:54  
23 lot of the drawbacks of open-ended 14:31:56  
24 questions. 14:31:58

25 So if someone simply said, 14:31:58

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2 "What was the main message, that it's 14:32:00  
3 natural," I counted them as part of that 14:32:01  
4 mentioned something about the natural 14:32:03  
5 representation. 14:32:04

6 Again, I am not using the 68.4 14:32:10  
7 percent for purposes of my opinion for 14:32:12  
8 any reason. 14:32:13

9 Q. And the response in the control 14:32:21  
10 group was even higher, right? 14:32:24

11 A. Yes. 14:32:25

12 Q. 72.8 percent? 14:32:25

13 A. Yeah, I don't know that that is 14:32:27  
14 statistically different, but, yeah, it's 14:32:30  
15 a little bit different. 14:32:33

16 Q. Well, I guess if you were going 14:32:37  
17 to run the net deception calculation just 14:32:39  
18 based off the questions or the answers to 14:32:41  
19 questions 1 or 2, you would have zero net 14:32:43  
20 deception, right? 14:32:48

21 A. Well, I mean, if you just use 14:32:48  
22 these numbers, but you couldn't use that 14:32:51  
23 calculation because, for example, people 14:32:53  
24 who said, let's just say in the test 14:32:54  
25 group, it says that it's natural, I don't 14:32:57

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2 know until I get to question 5 if they 14:33:01  
3 mean natural, meaning no artificial 14:33:03  
4 ingredients or something else. So it 14:33:05  
5 would be calculating a net on really 14:33:08  
6 vague data. I don't think you could draw 14:33:13  
7 any conclusions about it. 14:33:16

8 Q. Did you look at questions 1 or 14:33:17  
9 2 to determine whether survey respondents 14:33:21  
10 had indicated that "natural" meant no 14:33:27  
11 artificial ingredients to them? 14:33:33

12 A. Again, I got so many vague 14:33:35  
13 responses. I don't remember how many 14:33:37  
14 specifically said. But there were a lot 14:33:39  
15 of people who simply said, it says that 14:33:42  
16 it's natural. Or in the control group 14:33:45  
17 maybe it says that it contains some 14:33:47  
18 natural ingredients because they mention 14:33:49  
19 natural as a main message. I just lump 14:33:51  
20 that together. 14:33:53

21 So I don't think, it would be 14:33:54  
22 impossible from questions 1 and 2 to 14:33:58  
23 calculate any level of deception 14:34:00  
24 accurately or reliably. 14:34:02

25 Q. Do you know how many test group 14:34:12

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2 to talk about it. 14:45:56

3 MR. SAVARESE: Thank you. 14:45:57

4 Q. Now, question 4, is that 14:46:06

5 discussed in your report? 14:46:16

6 A. Only that I removed individuals 14:46:22

7 from question 4 who said that they do not 14:46:23

8 have -- they didn't know or were unsure 14:46:26

9 what the packaging communicated about 14:46:29

10 whether or not the product is natural. I 14:46:31

11 didn't report on them otherwise. 14:46:36

12 Q. Okay. So I am looking at D12 14:46:37

13 of your report. And this reports that 14:46:50

14 question 4 is "What did the product 14:46:56

15 packaging communicate about whether or 14:46:59

16 not the toothpaste is natural." 14:47:00

17 A. Yes. 14:47:03

18 Q. And you asked that same 14:47:03

19 question of deodorant survey respondents 14:47:08

20 and toothpaste respondents? 14:47:12

21 A. Yes, I did. 14:47:14

22 Q. Same question for test and 14:47:15

23 control? 14:47:16

24 A. Yes. 14:47:17

25 Q. So why did you ask question 4? 14:47:21

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2 A. It's really to -- I asked in 14:47:23  
3 question 3 whether they took away a 14:47:29  
4 message. I asked in question 4 what that 14:47:31  
5 message was. You get a lot of vague and 14:47:33  
6 ambiguous responses and I see this in the 14:47:37  
7 recoding that Dr. Kivetz did. People 14:47:39  
8 that just say it's natural. Those codes 14:47:41  
9 don't really help anything. They don't 14:47:47  
10 tell whether people take away a mistaken 14:47:48  
11 impression or not. 14:47:51

12 So that question is simply used 14:47:52  
13 to eliminate anyone who answered "Don't 14:47:54  
14 Know/Unsure" in that response option, so 14:47:58  
15 that I am filtering them into question 5, 14:48:00  
16 which is the focus of my opinion. 14:48:03

17 Q. So did you yourself conduct any 14:48:08  
18 coding in response to question 4? 14:48:10

19 A. No, again, because I think I 14:48:15  
20 wasn't relying on it for purposes of the 14:48:17  
21 opinion, I was reviewing the data. 14:48:19

22 I saw that there were a lot of 14:48:21  
23 vague responses. People just saying what 14:48:22  
24 does it say? It's natural. Natural. So 14:48:25  
25 if anything, it just simply confirmed my 14:48:30



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2 belief that the open ends will not, first 14:48:36  
3 of all are not designed to answer the 14:48:37  
4 relevant question. And second, it's why 14:48:40  
5 you're allowed a closed-end question, 14:48:43  
6 because you get such vague and ambiguous 14:48:45  
7 responses that don't really tell you 14:48:46  
8 anything. 14:48:48

9 Q. So for what purpose did you ask 14:48:50  
10 question 4 if you did not think that you 14:48:54  
11 would be able to rely on the results? 14:48:57

12 A. It's really to filter out 14:48:58  
13 anyone who said in question 3 that it 14:49:00  
14 communicated something about whether or 14:49:04  
15 not it's natural. But then in response 14:49:06  
16 in question 4, when asked "What does it 14:49:10  
17 communicate," they answered "Don't 14:49:12  
18 Know/Unsure," which means they may have 14:49:15  
19 been not answering question 3 in a manner 14:49:16  
20 that they should have been and they 14:49:23  
21 needed to be filtered out before I asked 14:49:24  
22 them question 5. 14:49:26

23 Q. Okay. And other than that 14:49:29  
24 filtering function for question 4, you 14:49:31  
25 didn't really consider the responses? 14:49:36

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2 A. No, I think, you know, as 14:49:37  
3 Mr. Keller writes and we talked about 14:49:39  
4 today, really the open-ended questions 14:49:41  
5 are a method to filter and funnel down to 14:49:45  
6 the detailed closed-in question, which is 14:49:47  
7 the focus of the test. That's really all 14:49:50  
8 I did. 14:49:52

9 A lot of reports I don't even 14:49:52  
10 report on the open ends at all because 14:49:54  
11 they don't provide any relevance to what 14:49:56  
12 my ultimate opinion is. 14:50:00

13 Q. Right. And this is just at 14:50:01  
14 your report where you didn't write on the 14:50:05  
15 responses to question 4? 14:50:07

16 A. I'm sorry, I didn't what on 14:50:09  
17 question 4? 14:50:15

18 Q. You didn't include in your 14:50:15  
19 report anything about question 4? 14:50:16

20 A. Only that in footnote 20 from 14:50:17  
21 the deodorant survey -- hang on one 14:50:23  
22 second. I'm sorry. Footnote 20 of the 14:50:30  
23 toothpaste survey, and footnote 31 of the 14:50:36  
24 deodorant survey, just to explain how I 14:50:44  
25 filtered out individuals from question 4 14:50:48

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2 who provided "Don't Know" responses, 14:50:50  
3 which is really the purpose of that 14:50:51  
4 question is a filter and funnel. 14:50:53

5 Q. So you mentioned Dr. Kivetz's 14:51:12  
6 coding of question 4. Do you have any 14:51:21  
7 opinions about the coding that Professor 14:51:26  
8 Kivetz conducted for the toothpaste and 14:51:29  
9 deodorant surveys on question 4? 14:51:32

10 A. I think what he did really 14:51:35  
11 shows the problems with trying to rely on 14:51:36  
12 open-ended codes. 14:51:39

13 For example, he parsed on 14:51:43  
14 anyone who said in response to question 4 14:51:44  
15 that it's natural as a "natural" 14:51:46  
16 response, which was about 50 percent of 14:51:52  
17 the total sample I believe. And he just 14:51:54  
18 arbitrarily assumed that they were not 14:51:55  
19 deceived. 14:52:00

20 And I think that's one of the 14:52:00  
21 problems that Dr. Jacobi talks about 14:52:01  
22 open-ended coding. That because it's 14:52:03  
23 open to subjectivity, different coders 14:52:05  
24 can come up with different 14:52:09  
25 interpretations of the data. He coded 14:52:10

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2 those individuals as "not confused." I 14:52:13  
3 could have looked at them and said 14:52:17  
4 because they said "natural," I do think 14:52:18  
5 they are confused. So really what he 14:52:20  
6 does, he points out how the subjectivity, 14:52:22  
7 the vague and ambiguous answers and 14:52:25  
8 open-ended coding really make them 14:52:28  
9 unreliable for anything other than a 14:52:31  
10 filtering and funneling process to get to 14:52:33  
11 the closed-end question, which is the 14:52:37  
12 focus of my opinion. 14:52:39

13 Q. Right. And for any consumers 14:52:43  
14 that may have had a different 14:52:45  
15 understanding of the word "natural," you 14:52:46  
16 didn't actually ask them what they think 14:52:49  
17 the word "natural" means, right? 14:52:51

18 A. Well, that's part of the 14:52:55  
19 problem. What Dr. Kivetz coded as quote 14:52:56  
20 unquote natural, again he's arbitrarily 14:53:00  
21 said they are not deceived. 14:53:03

22 If those same respondents, 14:53:04  
23 though, were asked question 5, some of 14:53:06  
24 them may say they take away a message 14:53:08  
25 that it communicates that it's only 14:53:10

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2 natural ingredients, no artificial 14:53:12  
3 ingredients. Some of those respondents 14:53:15  
4 may answer "Don't Know, Unsure, No 14:53:17  
5 Opinion," because they have a different 14:53:19  
6 interpretation. But you need to look at 14:53:20  
7 question 5 to understand that. You can't 14:53:22  
8 look at question 4, for example, to 14:53:25  
9 decide arbitrarily whether they are or 14:53:28  
10 are not deceived. You need the responses 14:53:31  
11 to question 5. 14:53:32

12 Q. And in question 5, you're 14:53:33  
13 basically asking consumers whether they 14:53:34  
14 agree with your definition of "natural"; 14:53:38  
15 is that a fair characterization? 14:53:40

16 A. No, I don't think so. I think 14:53:42  
17 it's asking them whether based on -- 14:53:44  
18 actually, let me go to my actual survey 14:53:45  
19 question. 14:53:48

20 It asked them, based on the 14:53:57  
21 product packaging, do you believe the 14:53:59  
22 toothpaste shown, and again three 14:54:00  
23 different interpretations for what it 14:54:03  
24 could mean or two options to give the 14:54:04  
25 respondent if they didn't take away that 14:54:07

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2 interpretation. So if they didn't 14:54:09  
3 believe that any of those definitions 14:54:12  
4 applied, they could have put "No Opinion" 14:54:13  
5 or "Don't Know, Unsure," which there are 14:54:15  
6 respondents who selected that. 14:54:18

7 Q. And I think we went over this 14:54:27  
8 earlier, but did you provide an option 14:54:28  
9 for question 5 survey respondents to 14:54:32  
10 indicate that they believed a natural 14:54:36  
11 product is one that is sourced or derived 14:54:39  
12 from nature? 14:54:42

13 A. Again, that wasn't the 14:54:43  
14 hypothesis I was testing. I was testing 14:54:45  
15 whether they understand it to mean 14:54:47  
16 contains only natural ingredients. That 14:54:49  
17 is not artificial ingredients. 14:54:51

18 If they took away that 14:54:53  
19 particular definition, and came with this 14:54:55  
20 question, they would have answered "No 14:54:59  
21 Opinion" or "Don't Know/Unsure," because 14:55:01  
22 their belief wouldn't align with what's 14:55:03  
23 presented here. And they had the option 14:55:05  
24 to say "I don't know" or "I have no 14:55:08  
25 opinion." 14:55:09

1 BRIAN SOWERS

2 Q. And did you include a response 14:55:15  
3 for question 5 for consumers who believed 14:55:19  
4 "natural" means sustainably sourced? 14:55:28

5 A. Again, if they took away that 14:55:30  
6 impression and they did not take away an 14:55:35  
7 impression about any of these three, they 14:55:37  
8 would have been "Don't Know/Unsure" or 14:55:39  
9 "No Opinion." 14:55:40

10 Q. Well, do you agree with me that 14:55:43  
11 consumers could believe that "natural" on 14:55:45  
12 a toothpaste or deodorant product refers 14:55:46  
13 to an aspect of the product other than 14:55:50  
14 its ingredients? 14:55:54

15 A. I think if that were true, then 14:55:54  
16 they had the option to say "No Opinion" 14:56:00  
17 or "Don't Know/Unsure," which is what 14:56:01  
18 those questions are for. 14:56:03

19 Q. And would you agree that 14:56:04  
20 consumers could believe that "natural" on 14:56:07  
21 a toothpaste or deodorant product refers 14:56:10  
22 to the product being derived from a 14:56:13  
23 natural elements? 14:56:16

24 A. I think, again, if they took 14:56:16  
25 away that impression, that would be 14:56:18

1 BRIAN SOWERS

2 reflected in the "No Opinion" and the 14:56:19

3 "Don't Know/Unsure" options in my survey. 14:56:22

4 Q. And would you agree that 14:56:24

5 consumers could believe that "natural" on 14:56:26

6 a toothpaste or deodorant product refers 14:56:29

7 to the product being sourced from a 14:56:31

8 natural element? 14:56:33

9 A. Again, if that was the belief 14:56:39

10 that they took and it didn't comport with 14:56:40

11 these three response options, it would be 14:56:42

12 reflected in the "No Opinion" or "Don't 14:56:44

13 Know/Unsure" response options. 14:56:46

14 Q. Would you agree with me that 14:56:47

15 consumers could believe that "natural" on 14:56:49

16 a toothpaste or deodorant product refers 14:56:52

17 to a product that is simple? 14:56:54

18 A. What do you mean by simple? I 14:56:55

19 guess I don't know what you mean by 14:57:04

20 simple. 14:57:06

21 Q. Okay. So you don't agree or 14:57:06

22 disagree with that? 14:57:08

23 A. I just don't understand your 14:57:09

24 question. I don't know what simple means 14:57:12

25 in that context. 14:57:18



1 BRIAN SOWERS

2 MR. SAVARESSE: Welcome back 15:16:17  
3 everyone. Welcome back from a short 15:16:17  
4 break. 15:16:19

5 BY MR. SAVARESSE:

6 Q. So Professor, or Doctor or 15:16:20  
7 Mr. Sowers. 15:16:25

8 A. Mr. 15:16:25

9 Q. So sorry about that. Just a 15:16:26  
10 few more questions here. I think we 15:16:29  
11 talked a little bit about this earlier. 15:16:32  
12 But I think you mentioned or you counted 15:16:36  
13 15 false advertising cases in which you 15:16:38  
14 offered opinion or testimony in the last 15:16:42  
15 five years? 15:16:44

16 A. Yes, I think so. 15:16:45

17 Q. Do you recall how many of those 15:16:49  
18 cases were on behalf of plaintiffs? 15:16:50

19 A. Hold on. Give me a second and 15:16:53  
20 I can tell you. 15:16:56

21 11 of the 15 have been for 15:18:02  
22 plaintiff. 15:18:04

23 Q. And then for the other four, 15:18:04  
24 were your opinions or testimony offered 15:18:08  
25 on behalf of defendants? 15:18:11

1 BRIAN SOWERS

2 A. Yes, they were. 15:18:13

3 Q. Which four cases were those? 15:18:14

4 A. Hold on. On page A3 it's 15:18:15

5 Organic Consumers Association versus 15:18:30

6 Handsome Brook Farm. 15:18:34

7 Page A5, Louisiana Pacific 15:18:36

8 Corporation versus James Hardie Building 15:18:45

9 Products. 15:18:47

10 Provepharm versus Akorn. 15:18:48

11 FTC versus Nudge LLC. 15:18:56

12 Q. Which page is that one? 15:19:17

13 A. A8, the top of the page, and 15:19:19

14 Hansen versus Newegg on the same page. 15:19:27

15 Q. Okay. And of the 15 false 15:19:48

16 advertising cases that you've been 15:19:58

17 involved in over the last five years, how 15:20:02

18 many of those, if any, were with Bursor & 15:20:04

19 Fisher? 15:20:10

20 A. None I believe. I don't 15:20:11

21 believe I worked with them before. 15:20:14

22 Q. Okay. And sorry, I am just 15:20:15

23 going to be skipping around a little bit. 15:20:23

24 We are in sort of hopefully the end phase 15:20:26

25 here. 15:20:30

1 BRIAN SOWERS

2 So just turning back to your 15:20:30

3 control design. 15:20:33

4 A. Yes. 15:20:36

5 Q. Do you agree, just sort of 15:20:37

6 generally, with the proposition that a 15:20:45

7 control, a control packaging design 15:20:48

8 should, should simulate real world market 15:20:51

9 conditions? 15:20:56

10 A. It should. That's why in my 15:20:57

11 survey I allow people to look at it from 15:21:03

12 multiple angles and to zoom in like they 15:21:05

13 could in the real world, so, yes, I 15:21:07

14 agree. 15:21:09

15 Q. Did you take any steps to 15:21:09

16 confirm whether there were any oral care 15:21:13

17 or personal care products that had red, 15:21:20

18 red labeling on them indicating that the 15:21:29

19 products contain some natural 15:21:34

20 ingredients? 15:21:35

21 A. I'm sorry, you broke up on me a 15:21:36

22 little bit and I just got a little thing 15:21:38

23 saying my internet is slow. Would you 15:21:40

24 mind repeating that, please? 15:21:42

25 Q. Sure. Did you take any steps 15:21:43

1 BRIAN SOWERS

2 to confirm whether there were any oral 15:21:45  
3 care or personal care products on store 15:21:48  
4 shelves that had red labeling on them 15:21:51  
5 indicating that the products contained 15:21:54  
6 some natural ingredients? 15:21:55

7 A. I don't think that's -- when 15:21:57  
8 you say replicating marketplace 15:22:01  
9 conditions, I mean you're able to see the 15:22:03  
10 product as it exists in the real world. 15:22:05  
11 And I think in terms of the control that 15:22:07  
12 I used, I'm correcting for what 15:22:08  
13 plaintiffs allege is defendant's 15:22:12  
14 deceptive advertising. 15:22:15

15 So I am not trying to mimic any 15:22:15  
16 particular product on the shelf. My 15:22:19  
17 control is to control for perceptions in 15:22:21  
18 the test condition. So that's a little 15:22:25  
19 bit different, I think, than marketplace 15:22:26  
20 conditions. 15:22:28

21 Q. Sure. I think I understand the 15:22:29  
22 distinction you're making. So let me try 15:22:32  
23 to ask my other question a little bit 15:22:34  
24 differently. 15:22:36

25 Do you agree that control 15:22:36

1 BRIAN SOWERS

2 packaging should resemble a commercially 15:22:42

3 viable product package? 15:22:45

4 MR. BECK: Form. 15:22:49

5 A. I think it depends on the 15:22:50

6 nature of the allegation. I mean here 15:22:52

7 what plaintiffs have alleged is that 15:22:57

8 Tom's natural representation is deceptive 15:23:00

9 and that it should have communicated this 15:23:06

10 all along. 15:23:08

11 So it's really -- not to come 15:23:09

12 off flippant, because it's not meant to 15:23:13

13 be -- it's not up to me to correct Tom's 15:23:15

14 advertising for the marketplace. For 15:23:18

15 purposes of my survey, I crafted up an 15:23:19

16 appropriate control to be able to control 15:23:22

17 for the element that I needed to in the 15:23:24

18 survey. 15:23:26

19 Q. I think the question I am 15:23:28

20 trying to ask is, do you believe or do 15:23:30

21 you agree that the control packaging 15:23:32

22 should resemble the packaging of a 15:23:36

23 product that a consumer might find on 15:23:39

24 store shelves? 15:23:41

25 A. Well, I mean, it does. My 15:23:42

1 BRIAN SOWERS

2 control is the package just controlling 15:23:46  
3 for the element that needs to be 15:23:48  
4 controlled. 15:23:50

5 In some situations, a control 15:23:51  
6 for trade dress, for example, you remove 15:23:53  
7 the name of the brand on there. And 15:23:55  
8 that's an appropriate control. So I 15:23:58  
9 think I disagree with that concept. I 15:24:03  
10 think a control should be as similar to 15:24:05  
11 the test but for whose element for the 15:24:10  
12 influence that you're testing, which is 15:24:12  
13 what I have done here. 15:24:14

14 Q. I guess another way to 15:24:15  
15 accomplish that would be to just remove 15:24:16  
16 the word "natural," right? 15:24:18

17 A. Well, that wouldn't be an 15:24:19  
18 appropriate control for what I am 15:24:24  
19 testing. If I had simply removed the 15:24:26  
20 word "natural," all that would control 15:24:27  
21 for is whether people may say there is a 15:24:30  
22 "natural" representation on the product 15:24:32  
23 when in fact there isn't. That's not 15:24:34  
24 what we needed to be controlled in my 15:24:37  
25 survey. 15:24:39

1 BRIAN SOWERS

2 My survey needed to control how 15:24:40  
3 many people, even if Tom's put on the 15:24:42  
4 package that it contains some natural 15:24:44  
5 ingredients, it contains one or more 15:24:46  
6 artificial ingredients, would still take 15:24:48  
7 away the mistaken impression. It 15:24:57  
8 wouldn't be the appropriate control for 15:25:00  
9 this survey. 15:25:01

10 Q. I guess I still think you 15:25:02  
11 haven't answered the prior question. 15:25:04

12 Do you agree that the control 15:25:06  
13 packaging design should resemble a 15:25:09  
14 product that consumers would find in the 15:25:12  
15 marketplace? 15:25:16

16 MR. BECK: Form. 15:25:17

17 A. Again, as it relates to this, 15:25:18  
18 there are surveys for litigation where 15:25:25  
19 the control is something completely 15:25:26  
20 different and is meant to be something 15:25:28  
21 that is not found in the marketplace. So 15:25:30  
22 as a general rule, no, I don't agree with 15:25:32  
23 that statement. 15:25:35

24 As it applies to my survey, 15:25:36  
25 again, my control is a product that's in 15:25:38

1 BRIAN SOWERS

2 the marketplace. I have simply added 15:25:42  
3 what plaintiffs allege should have been 15:25:44  
4 included all along. 15:25:47

5 Q. Okay. Well, did you do 15:25:48  
6 anything to confirm that the packaging 15:25:51  
7 that you designed looked like the package 15:25:56  
8 that a consumer might find on store 15:26:04  
9 shelves? 15:26:07

10 A. It is a Tom's packaging, so it 15:26:08  
11 is a product that's found on consumer 15:26:11  
12 shelves. 15:26:15

13 Q. Well, the package that you 15:26:15  
14 designed with the red lettering "Contains 15:26:18  
15 Some Natural Ingredients" in all caps is 15:26:22  
16 not a package that consumers see today, 15:26:26  
17 right? 15:26:29

18 A. No. Again, I am correcting for 15:26:30  
19 what -- plaintiffs allege that Tom's has 15:26:33  
20 been using deceptive advertising by using 15:26:37  
21 the phrase "natural." What I have done 15:26:39  
22 is corrected to account for plaintiffs' 15:26:41  
23 allegation. 15:26:44

24 So I think plaintiffs would 15:26:44  
25 agree that if Tom's had had this in the 15:26:46



1 BRIAN SOWERS

2 marketplace in the beginning, it would 15:26:50  
3 have gone a way towards dispelling the 15:26:51  
4 confusion. We know from my control that 15:26:53  
5 there is still a large number of people 15:26:56  
6 that still don't take away the 15:26:58  
7 appropriate message. So it's capturing 15:27:00  
8 guessing. But this package is supposed 15:27:03  
9 to represent something that would be, in 15:27:05  
10 plaintiffs' mind, not allegedly 15:27:07  
11 infringing, and that's the purpose of the 15:27:09  
12 control. Not commercially viable. 15:27:11

13 Q. Understood. Thank you. 15:27:13

14 And then just flipping back to 15:27:17  
15 the screener questions that you asked, do 15:27:19  
16 you know what portion of likely 15:27:24  
17 prospective purchasers who participated 15:27:28  
18 in your toothpaste or deodorant surveys 15:27:31  
19 are likely prospective purchasers of 15:27:36  
20 Tom's products? 15:27:40

21 A. I don't. So for purposes of 15:27:41  
22 the survey, I am not looking for Tom's 15:27:45  
23 purchasers specifically. But for 15:27:48  
24 deceptive advertising surveys, it's 15:27:50  
25 potential purchasers of the goods and 15:27:52

1 BRIAN SOWERS

2 services at issue. So it's natural 15:27:53  
3 toothpaste or natural deodorant, not 15:27:55  
4 necessarily Tom's. 15:27:58

5 Q. So in your survey, do you test 15:28:07  
6 or control for whether reasonable 15:28:08  
7 consumers believe "natural" on toothpaste 15:28:13  
8 or deodorant packaging means naturally 15:28:15  
9 sourced or naturally derived? 15:28:18

10 A. Again, that's not what I am 15:28:19  
11 controlling for. I am controlling for 15:28:23  
12 plaintiffs' hypothesis that it contains 15:28:26  
13 only natural ingredients, i.e., no 15:28:28  
14 artificial ingredients. 15:28:30

15 Again, if someone took away 15:28:32  
16 that impression, they would have had the 15:28:34  
17 option to select the "Don't Know/Unsure," 15:28:36  
18 the "No Opinion" response option, or if 15:28:39  
19 they felt they were being forced to 15:28:44  
20 guess, that would have been accounted for 15:28:48  
21 in my control condition. So it's 15:28:49  
22 covered, but not controlled. 15:28:51

23 Q. Okay. So are you offering an 15:28:52  
24 opinion in this case on whether 15:28:54  
25 reasonable consumers believe "natural" on 15:28:57

1 BRIAN SOWERS

2 toothpaste or deodorant packaging means 15:29:01

3 naturally sourced or naturally derived? 15:29:03

4 A. My opinion is based solely on 15:29:05

5 what I state is my opinion in paragraph 7 15:29:06

6 of my background and assignment; whether 15:29:14

7 consumers believed the "natural" 15:29:16

8 representation communicates that the 15:29:19

9 product contains only natural 15:29:21

10 ingredients, i.e., no artificial 15:29:24

11 ingredients. 15:29:24

12 Q. Okay. Did you test whether 15:29:26

13 reasonable consumers equate the "natural" 15:29:29

14 representation with a product that's 15:29:31

15 sustainably sourced? 15:29:34

16 A. That wasn't part of my 15:29:36

17 assignment. 15:29:40

18 Q. So you're not offering an 15:29:40

19 opinion on that question? 15:29:41

20 A. No. Again, I think if asked 15:29:43

21 about it, if someone took away that 15:29:48

22 impression from my survey, they would be 15:29:50

23 selected and accounted for in my "No 15:29:52

24 Opinion, Don't Know" response options. 15:29:57

25 Q. Did you test whether reasonable 15:29:58

1 BRIAN SOWERS

2 took that away as an unnatural 15:32:05

3 ingredient, that they would have 15:32:09

4 indicated as such in the survey. 15:32:09

5 Q. Let me ask the question again. 15:32:19

6 Did you test, sir, whether 15:32:21

7 reasonable consumers consider propylene 15:32:24

8 glycol to be a natural ingredient? 15:32:27

9 MR. BECK: Form. 15:32:29

10 A. Again, if that's one of the 15:32:30

11 ingredients in the products at issue and 15:32:32

12 respondents all had access to the product 15:32:35

13 packaging, to the labeling in the back, 15:32:37

14 they could see that, so that information 15:32:39

15 was available to them. 15:32:41

16 If they reviewed that and felt 15:32:42

17 that that was an artificial ingredient, 15:32:46

18 then that would be reflected in the 15:32:52

19 survey responses. 15:32:54

20 Q. Would it also be reflected if 15:32:54

21 they thought it was a natural ingredient? 15:32:56

22 A. It would. They had access to 15:32:59

23 that information. So if the inclusion of 15:33:01

24 that information would enhance or dispel 15:33:04

25 deception, it was available to 15:33:07

1 BRIAN SOWERS

2 respondents to see in the survey. 15:33:09

3 Q. And the same question, did you 15:33:13  
4 test whether reasonable consumers 15:33:15  
5 consider xylitol to be a natural 15:33:17  
6 ingredient? 15:33:21

7 A. Again, to the extent it was 15:33:23  
8 included in the products at issue, every 15:33:24  
9 respondent in the survey had the ability 15:33:28  
10 to look at the back of the packaging to 15:33:30  
11 see the ingredients. If they saw that 15:33:32  
12 information and they were still deceived, 15:33:34  
13 that would be reflected in the responses. 15:33:39

14 Alternatively, if that 15:33:42  
15 dispelled their deception, that would be 15:33:43  
16 reflected in the survey response as well. 15:33:45

17 Q. But you didn't ask them 15:33:48  
18 directly whether they think xylitol is a 15:33:49  
19 natural ingredient? 15:33:52

20 A. No, I think, thinking about 15:33:54  
21 Dr. Kivetz's report, he was saying the 15:33:58  
22 fact that this information was available 15:34:00  
23 would dispel deception. 15:34:01

24 Every respondent in my survey 15:34:04  
25 had access to look at the product 15:34:06

1 BRIAN SOWERS

2 packaging, to look at the ingredients. 15:34:08

3 So the extent that was something that 15:34:10

4 they would look at to make that 15:34:12

5 determination, it was available to them 15:34:13

6 in the survey. 15:34:15

7 Q. So you have a survey 15:34:18

8 respondent. They see xylitol on the 15:34:20

9 ingredient list on the back of the 15:34:24

10 packaging. And in response to question 5 15:34:26

11 they say that they believe the product 15:34:30

12 contains only natural ingredients. Is it 15:34:32

13 your belief that that survey respondent 15:34:39

14 believes xylitol is a natural ingredient? 15:34:41

15 A. It would be my opinion that 15:34:48

16 that respondent had the ability to see 15:34:48

17 that ingredient. If they saw that 15:34:50

18 ingredient and still took away an 15:34:52

19 impression that it contained only natural 15:34:54

20 ingredients, then, yes, I would say that 15:34:57

21 that respondent would have indicated 15:34:59

22 that -- would have believed that xylitol 15:35:00

23 was a natural ingredient. 15:35:03

24 Q. Same question for sodium lauryl 15:35:09

25 sulfate. Did your surveys test whether 15:35:12

1 BRIAN SOWERS

2 reasonable consumers consider sodium 15:35:19  
3 lauryl sulfate to be a natural 15:35:22  
4 ingredient? 15:35:24

5 A. The same answers. Every 15:35:24  
6 respondent had the ability to see the 15:35:25  
7 ingredients list and to zoom in very 15:35:27  
8 closely. If they looked at it and took 15:35:30  
9 away the impression that it was a natural 15:35:32  
10 ingredient, then that would be reflected 15:35:33  
11 in their survey response. 15:35:36

12 Q. Okay. And in the interest of 15:35:37  
13 these efficiencies, I am going to lump 15:35:41  
14 the rest of these ingredients into one 15:35:43  
15 question. Did your survey test whether 15:35:45  
16 reasonable consumers consider sorbitol or 15:35:46  
17 sorbic acid, glycerin or xanthan gum to 15:35:50  
18 be a natural ingredient? 15:35:54

19 A. To the extent those ingredients 15:36:00  
20 are included in the products that I 15:36:01  
21 tested, every respondent had access to 15:36:02  
22 the ingredient list and could zoom in 15:36:05  
23 very closely. So if they took away an 15:36:07  
24 impression from the survey that it was a 15:36:09  
25 natural ingredient, that would be 15:36:12

1 BRIAN SOWERS

2 reflected in their survey response. 15:36:12

3 Q. Did you test, sir, what 15:36:20

4 reasonable consumers understand the term 15:36:33

5 "artificial ingredient" to mean? 15:36:34

6 A. Again, it's defined in the 15:36:39

7 survey as natural ingredients, i.e., no 15:36:41

8 artificial ingredients. 15:36:44

9 As I said before, I pretested 15:36:45

10 the survey and didn't have any 15:36:49

11 respondents indicate that they didn't 15:36:50

12 understand what that definition meant. 15:36:52

13 Q. Do you have any opinions, sir, 15:36:54

14 on any redesigned Tom's packaging that 15:37:00

15 does not include the word "natural" on 15:37:02

16 the front? 15:37:04

17 A. I wasn't asked to test any of 15:37:09

18 the redesigned packaging. 15:37:11

19 MR. SAVARESSE: I have no 15:37:18

20 further questions. 15:37:19

21 MR. BECK: No redirect. 15:37:19

22 THE VIDEOGRAPHER: Now going off 15:37:27

23 the record at approximately 3:37 p.m. 15:37:28

24 (Time noted: 3:37 p.m.)

25



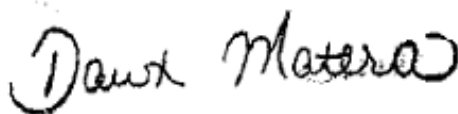
CERTIFICATION

I, DAWN MATERA, a Notary Public for  
and within the State of New York, do  
hereby certify:

That the witness whose testimony as  
herein set forth, was duly sworn by me;  
and that the within transcript is a true  
record of the testimony given by said  
witness.

I further certify that I am not  
related to any of the parties to this  
action by blood or marriage, and that I  
am in no way interested in the outcome of  
this matter.

IN WITNESS WHEREOF, I have hereunto  
set my hand this 16th day of September,  
2022.

A handwritten signature in cursive script that reads "Dawn Matera". The ink is dark and the signature is fluid.

DAWN MATERA